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IN THE

Supreme Court of the United States

October Term, 1983

GERALD D. BAIR, DIRECTOR OF REVENUE OF THE IOWA DEPARTMENT OF REVENUE; IOWA DEPARTMENT OF REVENUE; IOWA RAILWAY FINANCE AUTHORITY; MAURICE E. BARINGER, TREASURER OF IOWA AND CUSTODIAN OF THE SPECIAL RAILROAD FACILITY FUND; RAYMOND L. KASSEL, DIRECTOR OF TRANSPORTATION OF THE STATE DEPARTMENT OF TRANSPORTATION; STATE TRANSPORTATION COMMISSION OF THE STATE DEPARTMENT OF TRANSPORTATION; and STATE DEPARTMENT OF TRANSPORTATION,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; BURLINGTON NORTHERN RAILROAD COMPANY; CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY; ILLINOIS CENTRAL GULF RAILROAD COMPANY; NORFOLK AND WESTERN RAILROAD COMPANY; RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR; and UNION PACIFIC RAILROAD COMPANY,

Respondents,

IOWA RAIL SHIPPERS ASSOCIATION,

Intervenor-Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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IN THE SUPREME COURT OF IOWA

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; BURLINGTON NORTHERN RAILROAD COMPANY; CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY; ILLINOIS CENTRAL GULF RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR; AND UNION PACIFIC RAILROAD COMPANY,

Appellants,

vs.

GERALD D. BAIR, DIRECTOR OF REVENUE OF THE IOWA DEPARTMENT OF REVENUE; IOWA DEPARTMENT OF REVENUE; IOWA RAILWAY FINANCE AUTHORITY; MAURICE E. BARINGER, TREASURER OF IOWA AND CUSTODIAN OF THE SPECIAL RAILROAD FACILITY FUND; RAYMOND L. KASSEL, DIRECTOR OF TRANSPORTATION OF THE STATE DEPARTMENT OF TRANSPORTATION; STATE TRANSPORTATION COMMISSION OF THE STATE DEPARTMENT OF TRANSPORTATION; AND STATE DEPARTMENT OF TRANSPORTATION,

Appellees.

IOWA RAILROAD SHIPPERS COMPANY,

Intervenor.

(Filed September 21, 1983)

Appeal from Iowa District Court for Polk County, Anthony M. Critelli, Judge.

Appeal by railroads challenging validity of state tax on fuel consumption by railway vehicles. REVERSED.

Bennett A. Webster, Frank W. Davis, Jr., and Brent B. Green of Gamble, Riepe, Burt, Webster & Davis, Des Moines, and Sheldon I. Fink, William T. Barker, and Maureen Martin of Sonnenschein Carlin Nath & Rosenthal, Chicago, Illinois, for appellants.

Thomas J. Miller, Attorney General, Harry M. Griger, Special Assistant Attorney General, and Lester A. Paff, Assistant Attorney General, and Donald A. Wine, Stephen W. Roberts, and David W. Dunn of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, for appellees.

E. Kevin Kelly, Des Moines, for intervenor.

Considered en banc.

UHLENHOPP, J.

This appeal requires us to consider the validity of an Iowa tax which is challenged by plaintiff railroads, all of which are interstate carriers subject to the jurisdiction of the Interstate Commerce Commission (ICC). The State claims the tax is a salutory effort to require the entire Iowa railroad industry to help support the rehabilitation of its members who are in financial trouble. Unfortunately, the problem is not that simple, primarily because of an act of Congress prohibiting discriminatory taxation of railroads.

The financial condition of most American railroads deteriorated over a number of years. Part of the problem

was over-capacity, in the words of one expert, "too much track chasing too little traffic." The first significant response by Congress was enactment of the Regional Rail Reorganization Act of 1973 (3-R Act) which, inter alia, established a Rail Services Planning Office in the ICC.

The finances of railroads continued to deteriorate, however, and Congress next enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), which declared a national policy to "foster competition among all carriers by railroads and other modes of transportation." 45 U. S. C. § 801(b)(1) (1982 Supp.). The act made a major commitment of federal financing for railroad rehabilitation and improvement to selected railroads "according to the degree to which they are essential to the rail transportation system." 45 U. S. C. § 823(b)(1) (1982 Supp). The act resulted in ascertaining "corridors of excess capacity," and it eased procedures for abandonment of uneconomic railroad lines. In fostering competition among the several modes of transportation, the act also contained what is now section 11503 of title 49, United States Code (1983 Supp.), which proscribes discriminatory state taxation of railroads.

The condition of most railroads continued to worsen, and Congress eventually enacted the Staggers Rail Act of 1980, which substantially reduced regulatory control of rail rates, limited state authority to regulate in-state rail rates, and further eased abandonment procedures.

In 1981, the Iowa General Assembly enacted a special excise tax on railroads measured by the amount of fuel consumed to propel railway vehicles in the state. 1981 Iowa Acts ch. 3, § 29 (codified as Iowa Code §§ 324A.1 *et seq.* (1981)). Revenue from the tax is placed in a spe-

cial railroad facility fund, § 324A.9, for use in carrying out the functions of the Iowa Railway Finance Authority (Authority).

Creation of the Authority in section 307B.5 appears to be the result of reduced rail services in Iowa in recent years due to the railroads' increasing financial difficulties. Legislative findings on which creation of the Authority were predicated include:

> [3.] There will exist a serious shortage of viable rail lines and railway facilities serving the urban, rural, argicultural and industrial communities of the state.
>
> 4. There exists a serious problem in this state regarding the ability of agricultural producers to transport economically farm products to traditional markets because of the abandonment and possible abandonment of railway facilities within the state.
>
> 5. These conditions are making it more and more difficult for farmers and farm related businesses to survive in the present state of the economy thus threatening the very heart blood of Iowa.
>
> 6. One major cause of this condition has been recurrent shortages of funds in private channels and the high interest cost of borrowing.
>
> 7. These shortages have contributed to reductions in construction of new railway facilities, and have made the sale, purchase and repair of existing railway facilities a virtual impossibility in many parts of the state.
>
> 8. Iowa faces the possible consequences of two railroad bankruptcies and further reductions in service by other railroads due to deteriorating rail facilities. The loss of rail service on three thousand ninety miles may be the immediate consequence of the bankruptcies, with a resultant increase in trans-

portation costs. This will be accompanied by a reduction in Iowa farm income. Any prolonged loss of service on the essential portions of these rail facilities means the loss of jobs in Iowa and a loss to the state economy.

9. A stable supply of adequate funds for financing of railway facilities is required to encourage construction of railway facilities, the rehabilitation of existing facilities and to prevent the abandonment of others in an orderly and sustained manner and to reduce the problems described in this section.

10. It is necessary to create a railway finance authority to encourage the investment of private capital and stimulate the construction, rehabilitation and repair of railway facilities and to prevent the abandonment of others through the use of public financing, publicly assisted financing and other forms of public assistance.

Iowa Code § 307 B.3 (1983).

The General Assembly created the Authority for the purpose of "providing or providing for the financing of railway facilities and enhancing and continuing the operation of railway facilities. . . ." § 307 B.5. The "[d]eclaration of necessity and purpose" for the Authority states in part in section 307 B.2:

Access to adequate railway transportation facilities is essential to the economic welfare of the state. One purpose of this chapter is to preserve or provide for the citizens of Iowa those railway services now in existence or needed in the state which have a viable future but which for a variety of economic and legal reasons may not exist if the state does not provide the financing or other mechanisms referred to in this chapter. It is the intent of the chapter that any public ownership and control of railway facilities provided for in this chapter be transferred to private

> ownership as promptly as economically practicable subject to financing requirements. It is further intended that the authority created in this chapter be vested with all powers to enable it to accomplish the purposes of this chapter.

The record indicates the Authority contemplated using money from the special fund, derived in part from the railroad excise tax in question, to purchase various abandoned lines, especially the north-south "spine line" of the Rock Island Railroad running through Iowa which was abandoned after the Rock Island entered bankruptcy. The State would then either lease the abandoned lines to railroad competitors or eventually sell them back to the railroads. The Soo Line Railroad and the Chicago Northwestern Transportation Company made formal bids to the bankruptcy trustee and court to purchase the abandoned Rock Island spine line. The Northwestern was eventually allowed to purchase it.

The special excise tax was to go into effect on October 1, 1981. Iowa Code § 324A.3. Plaintiff railroads, however, filed a petition in equity on November 6, 1981, asking that collection of the tax be temporarily enjoined. Iowa Railroad Shippers Company intervened on the side of the railroads. A temporary injunction was granted on December 28, 1981, and trial of the action was held in January 1982.

The railroads challenged the tax on various grounds, the trial court upheld the tax, and the railroads appealed. In this court the railroads narrowed their attack to three grounds. They first contend the tax discriminates against rail carriers contrary to section 11503 of title 49, United States Code. Next, they claim the tax violates the Supremacy Clause in Article VI, Section 2, of the United

States Constitution. They argue that while Congress has streamlined the railroad industry to the lines which can survive and has forbidden discriminatory taxation in order to assist the viable lines, the General Assembly has burdened those lines with a tax for the purpose of helping the railroad to be abandoned. In this the railroads see a conflict of policies implicating the Supremacy Clause. Finally, the railroads urge that the tax contravenes the Commerce Clause in Article I, Section 8, of the United States Constitution because it is unrelated to services the state furnishes the railroads. *Complete Auto Transit Inc. v. Brady*, 430 U. S. 274, 277-78, 97 S. Ct. 1076, 1078, 51 L. Ed. 2d 326, 330 (1977). They assert that the revenue from the tax will not benefit them and in some instances will be used to compete against them.

Prefatorially, we note that state taxes carry a presumption of validity. *City of Pittsburgh v. Alco Parking Corp.*, 417 U. S. 369, 375, 94 S. Ct. 2291, 2295, 41 L. Ed. 2d 132, 138 (1974); *State ex rel. Bishop v. Travis*, 306 N.W. 2d 733, 735 (Iowa 1981).

I. *Violation of section 11503?* The railroads argue the state excise tax violates that portion of the Revised Interstate Commerce Act codified as section 11503 (b) (4) of title 49, United States Code. Subsection (b) of that section provides:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and in-

> dustrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) *impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.*

(Emphasis added.)

Sections 10101 and following of the Revised Interstate Commerce Act of 1978 recodified subtitle IV of title 49, United States Code. 49 U.S.C. §§ 10101 *et seq.* Section 11503 recodified section 306 of the 4-R Act, which was originally codified as section 26C of title 49, United States Code (1976). The legislative purpose of the Revised Interstate Commerce Act of 1978 was

> [t]o restate in comprehensive form, ***without substantive change,*** the Interstate Commerce Act. . . . In the restatement, simple language has been substituted for awkard and obsolete terms. . . .

H.R. No. 95-1395, reported in 1978 U.S. Code Cong. & Admin. News 3013 (emphasis added). *See also Alabama Great Southern R.R. v. Eagerton,* 663 F.2d 1036, 1037 (11th Cir. 1981) (language of § 11503 cannot be construed as making a substantive change in § 306).

Section 306 of the 4-R Act reads in pertinent part:

Section 306. Part I of the Interstate Commerce act (49 U. S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28 as follows:

"Sec. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) the levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad subject to this part."

(Emphasis added.) We thus construe section 11503 in light of the language in section 306.

Initially, section 306 did not contain subsection (d). A Senate report at that time stated the purpose of section 306 was

> [t]o eliminate the longstanding burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation property. . . . Substantively [this section] would amend the Interstate Commerce Act to declare unlawful, as an unreasonable and unjust discrimination against and an undue burden upon interstate commerce, a State or local tax rate, assessment, or collection upon the transportation property of a common or contract carrier at a higher level than upon property in the same taxing district. Procedurally, it would provide a remedy in the Federal courts for common and contract carriers against the collection of the excessive portion of any tax based upon such unlawful assessment or rate.

Senate Report No. 91-630, 91st Cong., 1st Sess. (1969). *See also Ogilvie v. State Board of Equalization of North Dakota*, 657 F. 2d 204, 206 (8th Cir.), *cert. denied*, 454 U. S. 1086, 102 S. Ct. 644, 70 L. Ed. 2d 621 (1981). Subsequently, when the Senate and House developed separate bills, subsection (d) was added in conference committee. *Alabama Great Southern R.R. v. Eagerton*, 663 F. 2d 1036, 1040-41 (11th Cir. 1981).

A. With this legislative history as background, we first inquire whether section 11503 applies at all in the present context. The State argues section 11503 prohibits only discriminatory *property* taxes and not excise taxes such as we have here. Relying first on principles of statutory construction, the State points to the title of section 11503: "Tax discrimination against rail transportation property." It also notes the prohibited taxes in

subsections (1), (2), and (3) all refer to property taxes, and it concludes that the words of subsection (4) [of section 306], "impose any other tax that discriminates", must refer to any other *property* tax. We do not think so.

The title of a statute or heading of a section cannot limit the plain meaning of the text. *Brotherhood of Railroad Trainmen v. Baltimore*, 331 U. S. 519, 528, 67 S. Ct. 1387, 1392, 91 L. Ed. 1646, 1652 (1947). We are unable to read Congress' words, "any other tax" to mean "any other property tax".

Our conclusion finds support in *Alabama Great Southern R.R. v. Eagerton*, 663 F. 2d 1036 (11th Cir. 1981). The court there held section 11503 applies to a business license tax, as against the argument the section applies only to property taxes:

> It would be difficult to imagine statutory language that would be less needful of construction than the "any other" language used here. Following three subparagraphs, (a), (b) and (c) dealing with taxation of "transportation property," paragraph (d) then forbids "the imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad." Without invoking any of the ordinary rules of construction, it would appear that paragraph (d) is indeed intended as a catchall provision to prevent discriminatory taxation of a railroad carrier by any means. This view is greatly strengthened when we consider the avowed purpose of the Act which has been clearly set forth by the Court of Appeals for the Eighth Circuit which has now affirmed the *Ogilvie* case:
>
> > As noted in our review of the history of this section, its purpose was to prevent tax discrimination against railroads in any form whatsoever.

Ogilvie v. State Board of Equalization, 657 F. 2d 204, 210 (8th Cir. 1981).

Id. at 1040.

The trial court in *Ogilvie* held: "The phrase 'any other tax' obviously means a tax not referred to in subsections (1)(b) or (c). . . ." *Ogilvie v. State Board of Equalization of North Dakota*, 492 F. Supp. 446, 454 (D.N.D. 1980), *aff'd*, 657 F. 2d 204 (8th Cir. 1981). The United States Court of Appeals for the Eighth Circuit recently made clear again that section 11503 is not limited to property taxes:

> Section 306(1)(d), rather than proscribing specific types of tax discrimination against "transportation property" like subdivisions (1)(a) through (c), prohibits "the imposition of any other tax which results in the discriminatory treatment of a common carrier by railroad." As the Fifth Circuit noted in *Alabama Great Southern Railroad Co. v. Eagerton*, 663 F. 2d 1036, 1041 (5th Cir. 1981), however, Congress' purpose in changing the language of section 306 from "transportation property" in subdivisions (1)(a) through (1)(c) to "any other tax" and "common carrier by railroad" in subdivision (1)(d) was most likely to broaden, not narrow, the scope of the section by *making it applicable to all forms of state taxation rather than just property taxation.*

Trailer Train Co. v. State Board of Equalization of North Dakota, F. 2d , n. 6 (8th Cir. 1983) (emphasis added).

The State also urges application of the doctrine of *ejusdem generis*, that general words (any other tax), following enumeration of specific terms (property taxes), apply only to the kinds of taxes previously enumerated. We do not find the doctrine to be applicable here. The

United States Supreme Court has recently stated that this doctrine is to be used only where the meaning of words is uncertain. *Harrison v. PPG Industries, Inc.*, 446 U. S. 578, 589, 100 S. Ct. 1889, 1895, 64 L. Ed. 2d 525, 535 (1980). We see no uncertainty in the clear and unambiguous words "any other tax." As pointed out by the court in *Eagerton*, 663 F. 2d at 1041:

> The Supreme Court made that clear in the *Gordon* case [*Gordon v. Appeal Tax Court*, 44 U. S. (3 How.) 132, 11 L. Ed. 529 (1845)], where the Court said: "The words 'any further tax' . . . will, by common consent . . . be intended to mean any additional tax besides that referred to, and not any further like tax." 44 U. S. at 147 [11 L. Ed. at 536].

The State contends that the legislative history of section 11503 supports its view that Congress intended to prohibit only discriminatory property taxes. We have examined the material the State cites. Acts of Congress, however, must be interpreted in light of the spirit in which they were written and the reasons for their enactment. *General Services Employees Union Local No. 73 v. NLRB*, 578 F. 2d 361, 366 (D. C. Cir. 1978). As already quoted in *Eagerton*, the federal court of appeals for this circuit stated the purpose of section 11503 "was to prevent tax discrimination against railroads in any form whatsoever." *Ogilvie v. State Board of Equalization of North Dakota*, 657 F. 2d 204, 210 (8th Cir. 1981). Moreover, as also stated in *Eagerton*, "a mere prohibition against discriminatory property taxes would be without effect if a state were to be permitted to enact any other discriminatory tax." 663 F. 2d at 1041. In addition, the words in the conference report which the State relies on ("limited . . . to taxation of railroad property") appear to dis-

tinguish property of *railroads* from property of *all carriers* as included in the Senate bill under consideration in the report. Sen. Rep. No. 94-595, 94th Cong., 2d Sess. (1976).

The Court of Appeals in *Eagerton* reached this conclusion about the state's argument of legislative history:

> Finally, the legislative history seems to us to cut the other way from that urged by the state of Alabama. The earlier bills did not contain anything like subsection (d). They were primarily concerned with an important *existing* discrimination in property taxes. Then, as stated by the appellee in its brief here: "Section 11503(b)(4) [correctly stated it should be section 306(1)(d)] does not appear to have been included in any of the debates. Instead, it seems to have been added at the last minute almost as an afterthought.' Of course, such debates as were had on the bill, under such circumstances, usually included the words "property" or "transportation property." But, towards the end of the debate, it must have become plain to Congress that a mere prohibition against discriminatory property taxes would be without effect if a state were to be permitted to enact any other discriminatory tax, so long as it was not a property tax. The appellees would have us ignore subparagraph (d) because they do not understand why Congress added it "almost as an afterthought." We cannot give such cavalier treatment to a formal act of Congress, or a part of it that seems clearly within the purpose and intendment of the law.

663 F. 2d at 1041.

In holding section 11503 applies to excise taxes, we note that the United States District Court for the Southern District of Iowa, faced with the same parties and issues, so held. *Atchison, Topeka, & Santa Fe R.R. v. Bair*, 535 F. Supp. 68 (S. D. Iowa 1982). Proceedings in

that case have been stayed pending disposition of the present litigation. We also note that the anti-discrimination section applicable to trucks is in fact limited to property taxes; it contains paragraphs (1), (2), and (3), but not paragraph (4) relating to other taxes. *Compare* § 11503 *with* § 11503a, 49 U. S. C. (1983 Supp.).

B. We thus approach the central question regarding section 11503: does the Iowa excise tax discriminate against railroads? The first problem involved in that question is this: with what other taxpayers and taxes do we compare the railroad fuel tax?

Because individuals and corporations in business usually have property in their enterprises, a tax on railroad property is compared with state taxes on property of commercial and industrial taxpayers generally. *Alabama Great Southern R.R. v. Eagerton*, 541 F. Supp. 1084, 1086 (M. D. Ala. 1982); *see Trailer Train Co. v. State Board of Equalization of North Dakota*, — F. 2d — (8th Cir. 1983); *Ogilvie v. State Board of Equalization of North Dakota*, 657 F. 2d 204, 209 (8th Cir. 1981). Property taxes of railroads must be nondiscriminatory when compared with property taxes of each and every other class of commercial and industrial taxpayer. *Arizona v. Atchison, Topeka & Santa Fe R.R.*, 656 F. 2d 398, 404 (9th Cir. 1981); *Ogilvie*, 492 F. Supp. at 455.

This particular tax, however, is not on property. It is on the burning of propulsion fuel in part of the transportation industry, the railroads. For relevant comparisons we must thus look to taxpayers who employ propulsion fuel in transportation. This narrows the field of comparison, in the main, to three other transportation modes; trucks, barges, and aircraft. Drawing on the anal-

ogy of property taxes, the present excise tax must be nondiscriminatory compared with fuel taxes on any of these other modes so as to avoid a competitive disadvantage.

In making the comparison with taxation of fuels burned by the other three modes, two limitations must be observed. First, we do not consider the whole tax structure of the state. *Arizona v. Atchison, T. & S. F. R. R.*, 656 F. 2d 398, 404 (9th Cir. 1981); *Alabama Great Southern R.R. v. Eagerton*, 541 F. Supp. 1084 (M. D. Ala. 1982); *Ogilvie v. State Board of Equalization of North Dakota*, 492 F. Supp. 446, 455 (D.N.D. 1980), *aff'd*, 657 F. 2d 204 (8th Cir. 1981). Second, because section 11503 is a prohibition on discriminatory *state* taxation of railroads, we compare *Iowa* fuel taxes on the several transportation modes; we do not add *federal* taxation to the equation. *Arizona Public Service Co. v. Snead*, 441 U. S. 141, 150, 99 S. Ct. 1629, 1634, 60 L. Ed. 2d 106, 113 (1979).

We thus turn to the actual step of making comparison, to the extent made possible by the record before us. The only tax which Iowa exacts regarding railroad fuel is the present one on the burning of fuel within the state, at the rate of three cents per gallon originally and eight cents per gallon since July 1, 1982.

Trucks. Competition for freight between railroads and trucks is intense; trucks have taken much of that traffic. In general, the Iowa excise tax regarding truck fuel, burned in the state, is thirteen cents per gallon for gasoline, ten cents per gallon for gasohol, and fifteen and one-half cents per gallon for diesel. Iowa Code §§ 324.3, .34, .52, .54.

Superficially the trucks rather than the railroads appear to be at a competitive disadvantage as to fuel

taxes. But a major adjustment must be made in order to compare railroad-fuel with truck-fuel taxes: the costs of construction and maintenance of the roads of the two modes must be placed in the balance. Trucks operate on publicly constructed and maintained roads. The various taxes which the General Assembly requires the trucks to pay go into an earmarked fund for the construction, maintenance, supervision, and administration of the highways. Iowa Const. Amend. 18. Those taxes represent the Assembly's judgment as to the portion of the cost of the highways that the trucks should bear. But the railroads acquire, construct, maintain, and pay taxes on their own roads. We thus have the railroads providing their own roads with the eight-cent fuel tax in addition, and the trucks paying the legislative approximation of their share of the highways without the additional eight-cent tax. This gives the trucks a distinct competitive advantage.

The State counters that plaintiff railroads could themselves apply for moneys from the railroad fuel tax fund. If the record demonstrated that plaintiff railroads will be taxed eight cents per gallon but will get it back again, they would sustain no loss and no discrimination. The record establishes, however, that the fund is for rehabilitation of the debilitated railroad lines and branches, not for viable railroads. The state would hardly tax operating railroads eight cents per gallon simply to pay it back to them.

Comparing state fuel taxation of railroads and of trucks, the railroad tax in question discriminates against the railroads contrary to section 11503.

Barges. Presently and potentially, barges constitute a substantial and competitive transportation mode, esepe-

cially in this area which is bounded by two great rivers. Barges generally use diesel fuel. They pay no Iowa excise tax on it, either in plying bordering rivers or in serving Iowa ports of call. They are not required to purchase diesel in Iowa, but they are subject to the Iowa sales tax of four percent of the price if they do purchase diesel in the state. *See Dodgen Industries, Inc. v. Iowa State Tax Comm'n,* 160 N. W. 2d 289, 294 (Iowa 1968). If barges buy none of their diesel in Iowa, they have a competitive Iowa tax advantage over railroads of eight cents per gallon for diesel. If they buy some or all of their diesel in Iowa, their competitive advantage is less, but it remains substantial. The railroads thus have a competitive Iowa tax disadvantage in comparison with barges.

At one time barges in navigable waters were considered immune from state taxation of fuel by virtue of the Commerce Clause. *Helson & Randolph v. Commonwealth of Kentucky,* 279 U. S. 245, 251, 49 S. Ct. 279, 281, 73 L. Ed. 683, 687 (1929). We believe *Helson* is no longer law as a result of *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Under *Complete Auto,* the challenger of a state tax must show that the activity taxed

> does not have a sufficient nexus with the State; or that the tax discriminates against interstate commerce; or that the tax is unfairly apportioned; or that it is unrelated to services provided by the State.

Id. at 277-78, 97 S. Ct. at 1078, 51 L. Ed. 2d at 330. The question here relates to the first part of the test—a sufficient nexus. We believe that Iowa has a sufficiently significant relationship to barge traffic on its bordering riv-

ers to satisfy that requirement. *See* 5 Stat. 742, § 3, 28th Cong., 2d Sess. (1845) (concurrent jurisdiction of Iowa over bordering rivers under act of admission into Union); Iowa Const. Preamble; Iowa Code (1983 §§ 1.1-.3; *Higman Towing Co. v. Cocreham*, 70 F. Supp. 628, 636-37 (E. D. La. 1947), *aff'd* 165 F. 2d 789 (1948) (state statute taxing income of foreign barge operators on Mississippi upheld); *Witke v. State Conservation Comm'n*, 244 Iowa 261, 267, 56 N. W. 2d 582, 586 (1953) (state may impose charges for use of improved waterway); 65 C. J. S. *Navigable Waters* § 10b (1966); *see also* 70 Am. Jur. 2d *Shipping* § 50, at 322 (1973); 15 C. J. S. *Commerce* § 73, at 651 (1967); 80 C. J. S. *Shipping* § 4 (1953); *cf. Pfeiffer v. Weiland*, 226 N. W. 2d 218, 220-21 (Iowa 1975) (maritime torts); *State v. Mullen*, 35 Iowa 199, 202 (1872) (crimes).

The State also argues that the question of apportionment—the third part of the *Complete Auto* test—would be difficult as between Iowa, on the one hand, and the surrounding states on the bordering rivers, on the other. Apportionment would be difficult and would pose administrative problems, but we do not think that a fair approximation, in a carefully drafted tax statute, is impossible or that administrative difficulties are insurmountable. An argument can also be made, if *He'son* is actually still the law so Iowa cannot tax barge fuel, that Iowa cannot tax railroad fuel either, because barges would otherwise have a *de facto* competitive state tax advantage contrary to the purpose of section 11503. We find no necessity to decide that point. Applying *Complete Auto Transit*, we hold that Iowa taxation of railroad fuel is discriminatory when compared with Iowa taxation of barge fuel, contrary to section 11503.

Aircraft. Competition between railroads and aircraft for freight does not appear momentous, but the possibility of some tax discrimination exists. Purchases in Iowa of aircraft fuel are subject to the four percent sales tax on the price. *See Dodgen Industries, Inc. v. Iowa State Tax Comm'n,* 160 N. W. 2d 289 (Iowa 1968); *Chicago, B. & Q. R. R. v. Iowa State Tax Comm'n,* 259 Iowa 178, 142 N. W. 2d 407 (1966). In addition, aircraft fuel purchased outside Iowa but used intrastate is subject to the four percent use tax on the price. 1983 Iowa Legis. Serv. S. F. 184 § 5 (West). *See United Airlines v. Mahin,* 410 U. S. 623, 629, 93 S. Ct. 1186, 1191, 35 L. Ed. 2d 545, 552 (1973). Aircraft pay the same excise taxes on gasoline (and gasohol) as trucks, but the tax is subject to refund. Iowa Code § 324.17. They pay no other excise taxes on aircraft fuel.

The result is that the most Iowa taxes that aircraft do in fact pay are four percent on the price. This constitutes a substantial competitive advantage over the eight-cent per gallon railroad fuel tax, constituting discrimination under section 11503.

We conclude that the railroad fuel tax violates section 11503 on comparison with each of the three other principal transportation modes.

II. *Violations of Supremacy and Commerce Clauses?* Since we have held that the Iowa excise tax violates section 11503, we leave the railroads' other two propositions undecided. We repeat our statement at the outset that we do not have a simple question of whether the railroad fuel tax is a salutory measure for Iowa railroads as a whole. We must consider the federal anti-discrimination statute and the reasons which prompted it. Under that statute we hold the Iowa railroad excise tax is invalid.

In taxing the costs, the clerk is directed to tax the expense for appendix and briefs at actual cost but not exceeding four dollars per page.

REVERSED.

All Justices concur except Carter, J., who concurs specially, and McCormick, Harris, Larson, and Wolle, JJ., who dissent.

CARTER, J. (concurring specially).

Although I cannot accept the court's reasoning as to why the railroad fuel tax is violative of 49 U. S. C. section 11503(b)(4), I agree that it is. I therefore concur in the result.

I do not find the court's comparison of the railroad fuel tax with other taxes levied incident to truck, barge, and air transportation to be helpful for purposes of applying section 11503(b)(4). The comparison which is made by the majority is based on supposed competitive disadvantage. Although the elimination of competitive disadvantage may have been one of the legislative purposes for the enactment of the statute, competitive disadvantage is not a practical standard by which to determine whether a tax is discriminatory. Too many variables are involved to make such comparisons meaningful.

I do not believe it would be possible under the test laid down by the majority to sustain any tax whose burden falls on interstate rail carriers if the incident of taxation differs from that employed in taxing other commercial taxpayers. I do not believe it was the intent of Congress to prohibit special tax treatment of interstate rail

carriers under section 11503(b)(4) if the tax is tied to benefits which are conferred on interstate rail carriers. Where, however, a tailored tax on the activities of interstate rail carriers is placed in a separate fund to be expended for specific purposes, the carriers protected by section 11503(b)(4) must receive from that fund benefits which are proportionate to the tax imposed. In the present case, while some individual carriers may benefit from the use made of Iowa's railroad fuel tax, any benefits flowing to interstate rail carriers as a class are too tenuous to stave off the carrier's section 11503(b)(4) challenge.

McCORMICK, J. (dissenting).

For me the determinative question is whether the challenged tax imposes a burden on railroads that is not uniformly placed on similarly situated commercial and industrial enterprises in Iowa. Before the tax can be held to violate 49 U. S. C. 11503(b)(4), plaintiffs must prove it is discriminatory on this basis. Because I believe they did not prove discrimination and have failed to establish any other ground for invalidating the tax, I would affirm the trial court.

Discrimination does not occur unless equals are treated unequally. One problem the railroads therefore have is in showing who their equals are in the business community for purposes of the federal statute. Congress defined the comparison group for determining whether a property tax violates the statute but did not identify the comparison group for evaluating other taxes. The comparison group for property taxes is "commercial and industrial property," defined in section 11503(a)(4) as "property, other than transportation property and land used primarily for

agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." Property taxes on railroads thus must be nondiscriminatory when compared with property taxes on the businesses in the defined group. *See generally Arizona v. Atchison, Topeka & Santa Fe R. R.*, 656 F. 2d 398, 403-06 (9th Cir. 1981).

Before a comparison group for the present tax can be defined, it is necessary to decide what is to be compared. This inquiry is not answered solely by identifying the taxable event. The precise taxable event here is the consumption of diesel fuel within Iowa for the propulsion of a railway vehicle. If the inquiry stopped there, the only comparison group would seem to be businesses other than railroads that operate railway vehicles. Certainly no discrimination has been shown on that basis. It is doubtful that Congress would have intended the comparison group to be so limited. I believe the separate treatment of property taxes under 11503(b) proves that the character of the tax provides the basis upon which the comparison group is to be identified. The state has labeled the tax a privilege tax. *See* Iowa Code § 324A.3 (1981). Privilege taxes are therefore the taxes that are to be compared. Privilege taxes are explained and distinguished from other taxes in *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977).

The federal statute, by its terms, delineates acts that Congress has determined will "unreasonably burden and discriminate against interstate commerce. . . ." § 11503(b). A violation of the statute thus turns on the character of the tax as burdensome and discriminatory upon interstate

commerce. It is the impact of the tax upon the taxpayer's relative position in interstate commerce that is significant. In subsections (1), (2), and (3), Congress has effectively decided the issue by requiring absolute parity in property tax rates. In subsection (4), however, the statute bars "another tax that discriminates against a rail carrier. . . ." The test under subsection (4) is therefore not one of parity but of discriminatory impact. *See Alabama Great Southern R. R. Co. v. Eagerton*, 663 F. 2d 1036, 1040 (11th Cir. 1981). Consequently I believe that to show a violation of section 11503(b)(4), the railroads must prove that the tax, regardless of the exact taxable event on which it is based, results in a disproportionate economic burden on railroads when compared to privilege taxes on other businesses engaged in interstate commerce.

I would therefore examine the relative burden of privilege taxes on similarly situated businesses rather than "competitive disadvantage" resulting from the tax. The approach I advocate is consistent with *Arizona Public Service Co. v. Snead*, 441 U. S. 141, 99 S. Ct. 1629, 60 L. Ed. 2d 106 (1979), because it involves consideration only of the burden from the type of tax involved rather than the impact upon a particular business of the state's entire tax structure. Competitive disadvantage cannot be determined through the requisite limited inquiry.

Furthermore, in attempting to identify similarly situated businesses, it is logical to look at transportation modes because they are most likely to have similar characteristics. In doing so, however, differences in the nexus between the state and particular business must be taken into account. This is a factor the court's opinion wholly

omits from consideration. Discrimination cannot be shown unless the privilege tax burden on businesses similarly situated is unequal when allowances are made for differences in the activities of the businesses within the state. This is because the state is entitled to measure the tax in accordance with the extent of the taxpayer's activities in the state. *See Commonwealth Edison Co. v. Montana*, 453 U. S. 609, 627, 101 S. Ct. 2946, 2958, 69 L. Ed. 2d 884, 900 (1981).

The only transportation mode that has activities in Iowa comparable to those of railroads is the trucking industry. As the court acknowledges, airplanes are not major competitors of trains. In addition, the extent of their activities within the state is limited. Barge routes are unique, and I question whether barges constitute competition as much as a complementary system of transportation. In any event, the extent of barge contact with the state is minimal. Trucks do have activities in the state similar to those of trains. They also pay a substantially higher tax on fuel consumption than do railroads. *See* Iowa Code § 324.34 (1983). Therefore I would not find that the tax on diesel fuel consumption is discriminatory when railroads are compared to the trucking industry.

Moreover, I do not think the disposition of the revenues is relevant. The railroad tax is earmarked for use by the Railway Finance Authority, and the trucking fuel tax is earmarked under Iowa Const. art. VII, § 8 for highway purposes. Although the "competitive disadvantage" may vary, the burden on the industry is not different merely because of earmarking of the revenues. In each instance the tax is a general revenue measure. In one

instance the legislature has dictated a particular use for the money, and in the other the people have dictated a particular use. The earmarked funds, however, might as well have come from general revenues. This is consistent with the approach set out for property taxes under 11503 (b), which includes no consideration of benefits received.

If benefits to the taxpayer were relevant, the relative value of other government services such as police and fire protection should be considered. If benefits that are paid for by the tax are relevant, so are benefits that are not paid for by it. In addition, a determination should be made of the actual share of highway costs paid by the truck tax, other privilege taxes such as license fees paid by trucks should be considered, and a calculation should be made of any economic benefit to railroads as a group from projects to be funded by the Railway Finance Authority. Therefore, even if benefits to the railroads were relevant, the record is wholly inadequate to prove discrimination on that basis. I do not believe, however, that benefits are relevant.

The issue is the relative burden of the tax. This is the test that was applied in *Alabama Great Southern R. R. Co. v. Eagerton*, 541 F. Supp. 1084 (M. D. Ala. 1982). In that case a railroad license tax was compared to other business license taxes. It was computed on a percentage of gross receipts while other businesses except utilities were taxed at a flat rate. The resulting burden on a rail carrier was 350 times the license tax on any Alabama commercial or industrial taxpayer other than utilities. After comparing the relative burden, and relying on expert testimony concerning the issue, the court held that the tax was discriminatory.

In the present case, no evidence of disproportionate burden appears. If anything, the trucking industry carries a heavier burden, perhaps for good reason. Air and barge modes of transportation have substantially less nexus with the state. When the differences in the extent of their contacts with the state and those of railroads are taken into account, it cannot fairly be said that the tax on railroad fuels results in a greater relative burden. Therefore I would hold that the railroad tax has not been shown to be discriminatory.

Because I would also hold that the railroads' constitutional arguments are without merit, I would affirm the trial court.

Harris, Larson and Wolle, JJ. join this dissent.

No. 69397

IN THE SUPREME COURT OF IOWA

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; BURLINGTON NORTHERN RAILROAD COMPANY; CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY; ILLINOIS CENTRAL GULF RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR; and UNION PACIFIC RAILROAD COMPANY,

Appellants,

vs.

GERALD D. BAIR, DIRECTOR OF REVENUE OF THE IOWA DEPARTMENT OF REVENUE; IOWA DEPARTMENT OF REVENUE; IOWA RAILWAY FINANCE AUTHORITY; MAURICE E. BARINGER, TREASURER OF IOWA AND CUSTODIAN OF THE SPECIAL RAILROAD FACILITY FUND; RAYMOND L. KASSEL, DIRECTOR OF TRANSPORTATION OF THE STATE DEPARTMENT OF TRANSPORTATION; STATE TRANSPORTATION COMMISSION OF THE STATE DEPARTMENT OF TRANSPORTATION; and STATE DEPARTMENT OF TRANSPORTATION,

Appellees.

IOWA RAILROAD SHIPPERS COMPANY,

Intervenor.

ORDER

(Filed October 14, 1983)

After consideration by the court en banc, appellees' petition for rehearing in the above-captioned case is hereby overruled and denied.

Done this 13th day of October, 1983.

THE SUPREME COURT OF IOWA

By /s/ W. W. Reynoldson
Chief Justice

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Case No. CE 16-09145

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; BURLINGTON NORTHERN RAILROAD COMPANY; CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY; ILLINOIS CENTRAL GULF RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR; and UNION PACIFIC RAILROAD COMPANY,

Plaintiffs,

vs.

GERALD D. BAIR, DIRECTOR OF REVENUE OF THE IOWA DEPARTMENT OF REVENUE; IOWA DEPARTMENT OF REVENUE; IOWA RAILWAY FINANCE AUTHORITY; MAURICE E. BARINGER, TREASURER OF IOWA AND CUSTODIAN OF THE SPECIAL RAILROAD FACILITY FUND; RAYMOND L. KASSEL, DIRECTOR OF THE TRANSPORTATION OF THE STATE DEPARTMENT OF TRANSPORTATION; STATE TRANSPORTATION COMMISSION OF THE STATE DEPARTMENT OF TRANSPORTATION; and STATE DEPARTMENT OF TRANSPORTATION,

Defendants,

IOWA RAILROAD SHIPPERS CO.,

Intervenor.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

The Petition in the above-captioned matter was filed on November 6, 1981. Plaintiffs sought relief in the nature of temporary injunction, enjoining enforcement of

and collection of tax involved; enjoining disbursement from Special Railroad Facility Fund by either Defendant IRFA or Defendant Baringer; that after bond is set or procedure determined for payment of estimated tax into court and hearing on the merits, the Court declare the tax sections unconstitutional, null and void, make the injunction permanent, and award Plaintiffs their attorney fees, costs and expenses.

On that same date the Court signed an Order setting this matter down for hearing on temporary injunction for the 23rd day of November, 1981.

The hearing on the temporary injunction did commence on the 23rd day of November, 1981, and concluded and was submitted to the Court on the 1st day of December, 1981.

Because the tax law involved required the Plaintiffs to make monthly reports of fuel consumption and pay the tax required and because the first requirement of reporting and payment of tax (for consumption during the month of October 1981) was required even before the Court had concluded the hearing on the temporary injunction, an Order was entered on the 30th day of November, 1981, granting all Plaintiffs an extension for reporting and payment of the taxes due for calendar month October 31, 1981, until December 30, 1981.

On December 23, 1981, the Court entered its Ruling on Plaintiffs' Application for Temporary Injunction. The Court ruled therein that the Plaintiffs were entitled to the requested Temporary Injunction. On December 28, 1981, a Temporary Injunction was entered and signed by the

Court granting the temporary relief requested and also providing for the amount of bond to be posted by the respective Plaintiffs.

A Petition of Intervention was filed by Iowa Railroad Shippers Co., and it appeared and participated in the hearing on the merits in these proceedings.

Trial on the merits commenced on the 25th day of January, 1982, and concluded with formal acceptance of testimony on the 29th day of January, 1982. By request of all parties, the record remained open. On March 26, 1982, a Stipulation was entered as to the final exhibits in these proceedings, and a Stipulation was also entered that the record would be closed (this was also filed on March 26, 1982).

A substantial briefing schedule was provided by the Court and was extended or modified, and in its final form provided that the final Reply Briefs were to be filed no later than April 23, 1982.

On May 27, 1982, the parties entered into a Stipulation to reopen this record for the purpose of admitting as a part of said record amendments to the tax law involved that had been passed by the 1982 session of the Iowa Legislature. The Court signed an Order on said date reopening the record for the sole purpose of making a part of said record the aforementioned amendments to the tax law.

After giving due consideration, therefore, to the total record made in these proceedings, including the lengthy open court trial sessions involving first the Temporary Injunction and then the hearing on the merits, the sub-

stantial exhibits filed and received in these proceedings, the substantial depositions agreed to be a part of this record by the respective parties, the briefs of the parties and the Court's own research in these proceedings, this Court is now prepared to issue its Findings of Fact, Conclusions of Law and Decree.

The Court first finds it has jurisdiction over the parties and subject matter herein.

Plaintiffs in these proceedings were all represented by Frank W. Davis, Jr., and Brent B. Green. Defendant, Iowa Railroad Finance Authority was represented by Stephen Roberts and Donald A. Wine. Defendant, Maurice E. Baringer, Treasurer of Iowa and custodian of the Special Railroad Facility Fund was represented by Mark E. Schantz. Defendant, Raymond L. Kassel, Director of Transportation, the State Transportation Commission and the State Department of Transportation were all represented by Lester A. Paff. Defendants, Gerald D. Bair, Director of Revenue and the Iowa Department of Revenue were represented by Harry Griger. Intervenor, Iowa Railroad Shippers Co. was represented by Kevin Kelly.

PARTIES

Plaintiff, the Atchison, Topeka and Santa Fe Railroad Company (herein "Santa Fe") is a Delaware railroad corporation with principal place of business in the state of Kansas and is qualified to do business in Iowa as a foreign corporation.

Plaintiff, Burlington Northern Railroad Company (herein "BN") is a Delaware railroad corporation with principal place of business in the state of Minnesota and

is qualified to do business in the state of Iowa as a foreign corporation.

Plaintiff, Chicago and Northwestern Transportation Company (herein "CNW") is a Delaware railroad corporation with its principal place of business in the state of Illinois and is qualified to do business in the state of Iowa as a foreign corporation.

Plaintiff, Illinois Central Gulf Railroad Company (herein "ICG") is a Delaware railroad corporation with principal place of business in the state of Illinois and is qualified to do business in Iowa as a foreign corporation.

Plaintiff, Norfolk and Western Railroad Company (herein "N&W") is a Virginia railroad corporation with principal place of business in the state of Virginia and is qualified to do business in Iowa as a foreign corporation.

Plaintiff, Richard B. Ogilvie, a resident of the state of Illinois, is the bankruptcy trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (herein "Milwaukee"). The Milwaukee is a Wisconsin railroad corporation with its principle place of business in the state of Illinois, and it is qualified to do business in the state of Iowa as a foreign corporation.

Plaintiff, Union Pacific Railroad Company (herein "UP") is a Utah railroad corporation with its principal place of business in the state of Nebraska, and it is qualified to do business in the state of Iowa as a foreign corporation.

Defendant, Gerald D. Bair is the Director of Revenue of the Iowa Department of Revenue.

Defendant, Iowa Department of Revenue (herein "Department") is an agency of the State of Iowa.

Defendant, Iowa Railway Finance Authority (herein "IRFA") is an agency of the State of Iowa existing under Chapter 307B of The Code of Iowa.

Defendant, Maurice E. Baringer is Treasurer of Iowa and as such custodian of the Special Railroad Facility Fund.

Defendant, Raymond E. Kassel is the Director of Transportation of the State Department of Transportation (herein "Director").

Defendant, State Transportation Commission of the State Department of Transportation (herein "Commission") is an agency of the State of Iowa existing under the provisions of Chapter 307 of The Code of Iowa.

Defendant, State Department of Transportation (herein "IDOT") is an agency of the State of Iowa existing under Chapter 307 of The Code of Iowa.

THE LEGISLATION INVOLVED

These proceedings are all concerned with the application, enforcement and constitutionality of what is now Chapter 307B of The Code of Iowa (effective June 3, 1980) as amended first by House File 874, Acts of the 69th General Assembly (effective September 15, 1981) and as amended by Senate File 2304, Acts of the 69th General Assembly (effective July 1, 1982).

As necessary, the pertinent portions of now Chapter 307B of The Code, other than those that have specific reference to the tax involved will be referred to hereinafter in this ruling.

Of primary importance to these proceedings, sections 19 through 29 of House File 874 establish a Special Railroad Facility Fund, the imposition of an excise tax, the requirement that a railroad company obtain a railroad company license and that the railroad company report, compute and pay the required tax.

The important part of section 24 of House File 874 reads as follows:

> "For the privilege of operating railway vehicles in this state, an excise tax is imposed at the rate of 3 cents per gallon beginning October 1, 1981, and is imposed at the rate of 8 cents per gallon beginning July 1, 1982, upon the use of fuel for the propulsion of a railway vehicle within the state. The tax attaches at the time of use and shall be paid monthly to the Department by the railroad company using the fuel. Fuel dispensed in this state shall only be through meters which have been approved for accuracy by the Department of Agriculture and sealed by the Department. Fuel dispensed through sealed meters shall be presumed taxable unless the railroad company proves otherwise."

Section 26 of House File 874 referring to the required railroad company reports, tax computation and payment states as follows:

> "For the purpose of determining railroad company's tax liability, each railroad company required to obtain a license under this chapter shall file with the Department a monthly report. The report shall be filed by the end of the month following the month of use. The report shall include the following information:
>
> 1. The total gallons of fuel dispensed in Iowa.
> 2. The total gallons of fuel dispensed in Iowa and placed in railway vehicles used solely within the state during the reporting period.

3. The total gallons of fuel dispensed in Iowa for nontaxable purposes.

4. The total gallons of fuel dispensed in Iowa and placed in railway vehicles used within and without the state.

5. The total gallons of fuel dispensed outside Iowa and placed in railway vehicles traveling within and without the state.

6. Other information the Director or Revenue requires.

The report shall be accompanied by a payment equal to the tax due. The taxable gallons of fuel shall be computed by adding the number of gallons of fuel dispensed in Iowa and placed into railway vehicles traveling solely within the state during the reporting period and the result of multiplying the total gallons of fuel used in railway vehicles traveling within and without Iowa by a fraction, the numerator of which is miles traveled in Iowa by railway vehicles traveling within and without Iowa and the denominator of which is the total miles traveled by the same railway vehicles. The tax shall be computed by multiplying the taxable gallons times the per gallon tax rate.

7. If a railroad company believes that the method of computing the tax of the prescribed mileage formula has operated or will so operate as to subject to taxation a greater portion of fuel than is reasonably attributable to use for the propulsion of a railway vehicle in this state, it shall be entitled to file with the Department a statement of objections and of such alternative method of determining fuel use in this state as it believes to be proper under the circumstances. If the Department concludes that the mileage formula in fact does not reasonably attribute fuel use to the state, it shall redetermine the tax per gallons of fuel by such methods as seen best calculated to

assign to the state the portion of fuel reasonably used in this state."

Also important to this discussion and the determination of the issues before the Court are some of the definitions that appear in section 23 of House File 874. These include the following:

"1. 'Fuel' means a combustible gas or liquid suitable for the generation of power for the propulsion of railway vehicles except it does not include motor fuel as is defined in section 324.2.

2. 'Department' means the Department of Revenue.

3. 'Railway vehicle' means a vehicle designed and used primarily upon railways for self-propulsion or for propelling conveyances.

4. 'Railroad company' means a person responsible for the operation of a railway vehicle within the state."

The aforementioned second amendment to section 307B of The Code in part provides for an annual payment of this tax if the railroad company's liabilities do not exceed $1,200 for a calendar year.

More important to these proceedings, this second amendment amends section 24 as above quoted having to do with the requirement of dispensation of fuel through "meters" and the pertinent part of section 24 as amended would read as follows:

"The tax attaches at the time of use and shall be paid monthly to the Department by the railroad company using the fuel. At such time the Iowa Railway Finance Authority deems it necessary, it may require that fuel dispensed in the state only be through meters which have been approved for accuracy by the Iowa Railway Finance Authority and sealed by the Author-

ity. The Authority may contract the responsibility for approving and sealing meters to the Department of Agriculture. Fuel dispensed through sealed meters shall be presumed taxable unless the railroad company proves otherwise."

The significance of this second amendment is that the dispensing of fuel through meters shall *only* be required if and when the Iowa Railway Finance Authority deems such action necessary. It is also important in that, following the amendment, the Iowa Railway Finance Authority is authorized to approve the accuracy of the meters rather than the Department of Agriculture. As indicated above, such Authority, however, may contract the responsibility for such approval and sealing of meters to the Department of Agriculture.

CLAIMED CONSTITUTIONAL AND STATUTORY VIOLATIONS

Stated in a substantially truncated and summarized method, Plaintiffs in their Petition allege and claim that House File 874 is either unconstitutional on its face and as applied or that it violates certain and specified portions of either the Constitution of the United States or the State of Iowa or of laws or statutes of said United States or State of Iowa and more specifically alleges that House File 874 violates:

a. The Commerce Clause of the United States Constitution, U. S. Const., Art. I., section 8, cl. 3, and the provisions of the Interstate Commerce Act, 49 U. S. C. sections 10101, et seq.

b. The Supremacy Clause of the United States Constitution, U. S. Const., Art. VI., cl. 2.

c. The Due Process Clauses of the United States Constitution, U. S. Const., Amend. 5 and 14, section 1, the Due Process Clause of the Iowa Constitution, Iowa Const., Art. I., section 9, and the tax specificity requirement of the Iowa Constitution, Iowa Const., Art. VII., section 7.

d. The Due Process Clauses of the United States Constitution, U. S. Const., Amend. 5 and 14, section 1, and the Due Process Clause of the Iowa Constitution, Iowa Const., Art. I, section 9.

e. The Equal Protection Clause of the United States Constitution, U. S. Const., Amend. 14, section 1, and the uniform laws requirements of the Iowa Constitution, Iowa Const., Art. I., section 6 and Art. III, section 30.

f. The Privileges and Immunities Clause of the United States Constitution, U. S. Const., Amend. 14, section 1, and the uniform laws requirements of the Iowa Constitution, Iowa Const., Art. I., section 6 and Art. III., section 30.

g. The seperation of powers requirement of the Iowa Constitution, Iowa Const., Art. III., section 1.

h. The public purpose requirement of the Iowa Constitution, Iowa Const., Art. III., section 31.

i. 42 U. S. C. section 1983.

THE RAILROADS

Admitted paragraph 17 of Plaintiffs' Verified Petition as amended alleges the Plaintiff railroads are common carriers by railroad, are engaged in the interstate and intrastate transportation of freight for hire, and the furnishing of services in connection therewith, are sub-

ject to the provisions of the Interstate Commerce Act, 49 U. S. C. sections 10101, et seq., and are rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under 49 U. S. C. section 10501.

Admitted paragraphs 18 through 24, inclusive, of Plaintiffs' Verified Petition as amended sets forth certain background information concerning each of the railroads involved. For the most part, the information alleged and admitted has reference to calendar year 1980. The information includes the number of miles or trackage owned by the railroad through its system, the amount of such trackage owned within the state of Iowa, the number of diesel locomotives operated by the railroad, the amount of diesel fuels (in gallons) consumed by the railroad, the number of miles traveled by the locomotives throughout the system, the number of such miles traveled within the state of Iowa, the amount of property tax paid by the railroad on property owned by it in the state of Iowa, and the amount of other taxes paid by the railroad to the State of Iowa and its political subdivisions.

Rather than set forth all of this detailed information which covers four typewritten pages in the Petition, as such factual matters have been admitted and as evidence was presented in support of same, the Court finds that same are generally true and correct, and rather than set same forth in this already burgeoning opinion, the Court adopts as admitted and includes herein as if set forth in their entirety the statements at least in a general manner as are contained in paragraph 17 through 24 of the Plaintiffs' Petition as amended.

LEGISLATIVE CHRONOLOGY

The regular session of the first session of the 69th General Assembly (1981) ended on May 22, 1981. The first extraordinary session began on June 24 and ended on June 26, 1981. House File 874 (the tax bill) passed the House of Representatives on June 26, 1981. The only bill passed and adopted by both houses of the legislature during this first extraordinary session was one that established dates for the submission and application of certain acts incident to the process of legislative redistricting.

An Attorney General's Opinion was requested by State Senator George R. Kinley, and it appears that same was issued on August 11, 1981. It had reference to the constitutionality of this tax law but was limited to an opinion concerning whether or not the tax law was an unconstitutional burden on interstate commerce (only one of the constitutional questions presented in these proceedings).

The second extraordinary session commenced on August 12 and terminated on August 14, 1981. Apparently, House File 874 received legislative approval by the State Senate during this second session and during one of the three mentioned dates. That same second extraordinary session of no more than three days' duration also apparently passed a final reapportionment plan, a motor fuel tax bill (it appears to have raised motor vehicle gas tax by 1 cent per gallon for a period of about 22 months), and a bill that extended the time for the elderly and disabled to file for property tax relief.

Although it is conceivable and perhaps even likely that at least in general terms the contents of and the concept of this tax bill were being considered by committees or

legislative leaders and the administration prior to the aforementioned extraordinary sessions, the Court considers it at least necessary and proper to set forth the above chronology which is at least arguably supportive of the Plaintiffs' Petition that this legislation was conceived and considered in haste and without the benefit of adequate consideration and debate concerning the numerous alleged deficiencies and problem areas that have been raised by Plaintiffs in these proceedings.

As indicated above, the Iowa Legislature passed a second bill which in part amended the "metering" requirement. This bill was passed during the legislative session in 1982 and was effective July 1, 1982. It was SF 2304.

The legislative chronology of that particular bill is important because it probably was filed and passed both houses *after* our record was closed and *after* the questions concerning the "metering" problems had all surfaced in these proceedings. That chronology is at least arguably supportive of the fact that the Defendants recognized the existence of "metering" problems and had the bill passed to preserve, as they could, the integrity of the total legislation.

As indicated above, all counsel requested that the record be reopened to the end that the Court could consider this last passed legislation as a part of the total record. If this Court registers an opinion based on a record both with and without this latest legislation, it will eliminate the necessity of these same parties being back before the Court for such purpose. The Court has agreed to issue such opinion as requested.

BURDEN OF PROOF ON PLAINTIFFS TO PROVE UNCONSTITUTIONALITY

The burden of proof that rests upon the Plaintiffs if they are to prevail in these proceedings and the presumptions of constitutionality with which statutory enactments are manteled require recognition. A carefully worded and all inclusive statement concerning constitutional presumptions and the burden of proof required of one seeking to dislodge constitutionality is set forth by the Iowa Supreme Court in *City of Waterloo v. Selden*, 251 N. W. 2d 506, at page 508 as follows:

> "The general principles applicable to the determination of the constitutionality of the challenged statutory provision are well established. All presumptions are in favor of the constitutionality of the statute, and it will not be held invalid unless it is clear, plain and palpable that such decision is required. The legislature may pass any kind of legislation it sees fit, so long as it does not infringe the state or federal constitutions. Courts do not pass on the policy, wisdom, advisability or justice of a statute. The remedy for those who contend legislation which is within constitutional bounds is unwise or oppressive is with the legislature. The burden is not upon Defendant, Selden, and Intervenor, State Appeal Board, to prove the act is constitutional. Plaintiffs have the burden to demonstrate beyond a reasonable doubt the act violates the constitutional provision envoked and to point out with particularity the details of the alleged invalidity. To sustain this burden, Plaintiffs must negative every reasonable basis which may support the statute. *Dickinson v. Porter*, 240 Iowa 393, 399-400, 35 N. W. 66, 71 (1949). Every reasonable doubt is resolved in favor of constitutionality. *Avery v. Peterson*, 243 N. W. 2d 630, 633 (Iowa 1976)."

The subject in *Selden, supra,* was not the constitutionality of an enacted tax but rather dealt with the constitutionality of legislation which had the effect of imposing budget limitations on cities with populations of more than 750.

Iowa's single-sales factor formula for taxing net income of corporations doing interstate business was attacked as being unconstitutional in *Moorman Manufacturing Company v. Bair,* 254 N. W. 2d 737 (1977). The Court stated beginning at page 743 as follows:

> "It is well settled with notable exceptions not here involved that all presumptions are in favor of the constitutionality of a regularly enacted statute.
>
> Where the constitutionality of a statute is merely doubtful, this Court will not interfere as it must be shown that legislative enactments clearly, palpably and without doubt infringe upon constitutional rights before an attack will be upheld.
>
> Moorman as the attacking party has the burden to demonstrate beyond a reasonable doubt the Act violates the constitutional provisions envoked and to point out with particularity the details of the alleged invalidity. To sustain this burden, it must negative every reasonable basis which may support the statute (cases cited)."

Continuing on page 743 the Court in *Moorman* stated:

> "Keasling v. Thompson, 217 N. W. 2d 687, 690 (Iowa 1974), states this principle:
>
> 'The judicial branch of the government has no power to determine whether legislative Acts are wise or unwise, nor has it the power to declare an Act void unless it is plainly and without doubt repugnant to some provision of the Constitution.'
>
> In the field of taxation, it would appear the above principles somewhat understate the defe ence accorded

the legislature. In this regard, see 71 Am. Jur. 2d, State and Local Taxation, section 96, page 417, and 84 C. J. S. Taxation, section 7, pages 53-54."

Judicial pronouncements concerning the extraordinarily heeavy burden which will be borne by the Plaintiff challenging the constitutionality of a tax statute are not just of recent vintage. In *Lee Enterprises, Inc. v. Iowa State Tax Commission,* 162 N. W. 2d 730, 739 (Iowa 1969), the Iowa Supreme Court quoted *State v. Fairmont Creamery Company,* 152 Iowa 702, 711, 133 N. W. 895, 899, a 1911 decision as follows:

> "The Constitution was intended to announce certain basic principles to serve as a perpetual foundation of a state. It was not intended to be a limitation upon its helpful development, nor to be an obstruction to its progress. New days bring new problems. Legislation must meet these problems as they come. Otherwise, our plan of government must prove inadequate. Manifestly, we ought not to be swift to adopt such a technical or a strained construction of the Constitution as would unduly impair the efficiency of the legislature to meet its unavoidable responsibilities."

UNCONSTITUTIONALITY BASED ON VIOLATION OF 49 U. S. C., SECTION 11503(b) (4)

Section 306 of the 4-RA Act now codified as 49 U. S. C., section 11503(b) provides:

> "The following acts unreasonably burden and discriminate against interstate commerce and a state, subdivision of a state, or authority acting for a state or subdivision of a state may not do any of them:
>
> • • •
>
> (4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission

> under subchapter I of Chapter 105 of this title."

It is undisputed that the Plaintiffs are providing transportation subject to the jurisdiction of the Commission under the indicated title.

Although arguments were proposed to the contrary, there is no question in this Court's mind that the imposition of the tax involved herein comes within the perameters of the aforementioned and quoted section 11503(b)(4). On September 22, 1981, the same Plaintiffs in these proceedings brought a federal complaint against the same Defendants in United States District Court for the Southern District of Iowa. The identical relief sought by the Plaintiffs in these proceedings was the subject of the federal action, and same was heard by the federal court on December 21, 1981. The basis of the Motion to Dismiss was the Defendant's reliance on the Federal Anti-Tax Injunction Act, 28 U. S. C., section 1341, which provides in pertinent part as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law or a plain, speedy and efficient remedy may be had in the courts of such state."

In response, the Plaintiffs took the position that the federal court did have jurisdiction to maintain the instant action, under the exception to section 1341 as contained in 49 U. S. C., section 11503, as follows:

> "(c) *Notwithstanding section 1341 of Title 28* and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction concurrent with other jurisdictions of courts of the United States and the states to prevent a violation of subsection (b) of this section." (Emphasis added.)

Chief Judge Stuart in his decision of February 2, 1982, (*Atchison T & SF Ry. Co. v. Bair,* 535 F. Supp. 68 (S.D. Iowa 1982), overruled the Motion to Dismiss relying on the 11th Circuit Decision in *Alabama Great Southern Railroad Company v. Eagerton,* 663 F. 2d 1036. He held that the aforementioned subsection (d) which has reference to "any other tax" was *not* limited to any other *property* taxes, but meant just what it said, i.e., "any other tax", and that an excise tax such as is involved in both that federal district court action and in this Iowa district court action was the type of imposition of tax that could on adequate proof of "discriminatory treatment of a common carrier by railroad subject to this chapter" be considered and held to be an unreasonable burden and discrimination against interstate commerce.

This Court concurs and agrees with the position and decision of Judge Stuart and rules that the excise tax involved herein is an "any other tax" for the purposes of subsection (b) of the federal law above quoted and cited.

Having so determined, it is now necessary for this Court to determine on the basis of this record whether or not Plaintiffs have met their burden and have presented adequate proof to the effect that by the imposition of such tax there has resulted in a "discriminatory treatment of a common carrier by a railroad subject to this chapter".

Respective counsel have dealt with this question of "discrimination" in their briefs, Plaintiffs in their Post-Trial Brief beginning on page 109 and in their Reply Brief beginning on page 31 and Defendants beginning on page 132 (actually 141) of Defendants' Brief and beginning on page 33 of Defendants' Reply Brief.

Although it appears that the Defendants would opt for the "entire tax structure" test, this Court rules that a more fair, equitable and proper and perhaps legal test would be a comparison of the current tax situation involving railroads as opposed to other modes of transportation, i.e., barges, truckers and to some extent airlines. (See *Arizona Public Services Company v. Snead,* 441 U.S. 141; 99 S.Ct. 1629; 60 L.Ed. 2d 106; a 1979 case.)

Plaintiffs contend that there is discrimination because HF 874 imposes a tax solely on railroads and not upon competing modes of transportation. They contend that motor fuel tax paid by truckers is not comparable because that tax is used solely for the construction and maintenance of highways on which the trucks travel. Plaintiffs contend that barges are not taxed at all in the state of Iowa and such taxes and fees that they pay to the federal government are likewise to defray the costs of maintaining these publicly owned right-of-ways. Plaintiffs contend that neither trucks or barges pay property tax on their public right-of-way and the only other state charges paid by truckers for use of highways are registration fees under section 321.122 of The Code of Iowa.

In that respect, the Court notes that the highest annual registration fee charged by the state of Iowa for truck tractors, road tractors, etc., is $1,695 for such piece of equipment that weighs between 39 and 40 tons, the amount increasing at the rate of $80 for each ton over 40 tons. To this Court's recollection there was no testimony or evidence or exhibit offered in these proceedings bearing on the general question and position as to the extent

and amount of "registration fees" collectively paid by commercial truckers to the state of Iowa. Of course, in addition to the aforementioned collective registration fees, other physical personal and real property owned by trucker corporations within the State of Iowa and upon which taxes are imposed and paid to the State of Iowa would be important in viewing this mode of transportation collective tax responsibility.

We do have in this record by stipulation and admitted pleadings the fact that for the year 1980 the Plaintiffs collectively paid to the State of Iowa almost 7 and ½ million dollars in either property taxes on property owned by them in the State of Iowa and other taxes owed to the State of Iowa and its political subdivisions.

Considerable of the briefs of Plaintiffs dealt with the undisputed fact that neither trucks nor barges pay property taxes on their public rights-of-way. On the other hand, the railroads do pay property tax on their right-of-way, as that property is owned by the railroads and is taxed by the state or other subdivisions thereof. Plaintiffs argue further that they would receive or see little direct benefit from this tax imposed. Whereas, on the contrary, and for example giving full consideration to the vehicle fuel tax paid by truckers, those taxes go to defray and maintain expenses in connection with highways which are, of course, used by truckers in their business.

The Court's attention has been called to three exhibits in these proceedings for the reason that in the opinion of the Defendants they contain relevant statements on the question of discrimination. These exhibits consisted of Deposition Exhibit 127 (which appears to be a position

paper or staff recommendation of the IDOT concerning "State Ownership of Essential Rock Island Trackage"), Deposition Exhibit 130 (a statement prepared to be given to the House Ways and Means Committee at a public hearing on railroad transportation, same prepared by the IDOT Planning and Research Division), and Deposition Exhibit 152 (what appears to be minutes of a meeting of the Iowa Railway Finance Authority). Coincidentally, the aforementioned exhibits were specifically brought to the Court's attention by Plaintiffs on page 110 of Plaintiffs' Post-Trial Brief for the purpose of indicating to the Court that the "Defendants themselves have repeatedly recognized that such intermodal discrimination is forbidden". While these three exhibits do perhaps support the reason why they were referred to the Court by Plaintiffs, they also beared, in this Court's view, on this question of "discrimination".

For instance, Exhibit 127 in discussing "railroad diesel fuel tax" contained certain staff findings and computations. The exhibit contained the statement that a tax of 10 to 15 cents per gallon (we are here involved with a maximum of 8 cents per gallon) would have a minimal impact (1 to 1.5 percent) on the cost of railroad transportation services, that a 10 to 15 cent per gallon tax would approximate the tax levels which will be charged over the next several years to motor carriers and barge operators, and that Iowa's collection of all taxes from railroads on a per mile basis is among the lowest of all of the states (even the collection of 15 million dollars of revenues—based on 15 cent per gallon tax—would only place Iowa above 50 percent in comparison with all of the other states).

It was indicated that fuel costs currently represent about 15 percent of railroad freight operating costs, that a 1 cent tax levied upon a gallon of fuel (which currently costs railroads buying on bulk contracts about 1 dollar per gallon) would increase railroad operating costs by only about 0.15 percent. Thus, a 10 cent per gallon tax would raise costs by 1.5 percent.

A comparison was set forth of the anticipated percentage of traffic loss relative to the rail traffic involving certain specific products such as agricultural crops, chemicals, stone and clay, transportation equipment, machinery, metals, corn and soybeans, etc. It reflected the impact of a 1 percent rail rate increase. The estimated percentage of traffic loss ranged from a high of 2.7 percent involving the shipping of transportation equipment nationwide to a low of 0.2 percent concerning the transportation of metals nationwide and the transportation of corn and soybeans, northwest Iowa.

The report-exhibit also presented the supposition that increases in fuel taxes for trucks and/or barges in the future were likely to become a reality. Assuming a 10 percent tax on rail fuel and likewise assuming for various comparisons a 3.5 cent per gallon increase in truck fuel, a 4 cent per gallon barge fuel increase and a 3.4 cent per gallon barge fuel increase, the report went on to make a comparison of the impact upon rail traffic assuming the aforementioned variables and possible increases. Depending on the variables used, the anticipated percentage of traffic gain or loss was indicated. The Court notes in that regard that on the assumption of a 10 cent rail increase, a 3.5 cent truck increase and a 4 cent barge increase the report indicated that there would be a "negligible change".

The other two named exhibits, i.e., Deposition Exhibit 130 and Deposition Exhibit 152, are only of particular significance because in each instance the exhibit-report indicated that there was definitely a question of constitutionality involving this proposed tax on this question of "discrimination".

Considerable brief attention was given to comparison of the current "comparable" taxes imposed concerning barge operations and trucking. Currently, diesel fuel purchased in Iowa by barges is subject to Iowa sales tax but not the Iowa fuel tax. However, diesel fuel used by barges is taxed by the United States government and presumably these taxes are used to keep up and maintain the waterways. That tax amounts to 6 cents per gallon, is to go to 8 cents per gallon on October 1, 1982, and to 10 cents per gallon on October 1, 1985. It is the position of the Defendants that at the present time the Plaintiffs enjoy the benefit of substantial competitive advantage as compared with barges since the Plaintiffs pay no tax at all on their use of fuel. It is the position of the Defendants that the overall tax burden upon barge diesel fuel created by the federal tax and the Iowa sales tax is presently greater than that borne by railroad diesel fuel under HF 874.

In regards to a comparison of trucker taxes, it appears that the truckers are required to pay diesel fuel tax in the amount of 13½ cents per gallon, again substantially in excess of the maximum now proposed for the railroad diesel fuel tax of 8 cents per gallon. It is likewise the Court's understanding that as of July 1, 1982 (the date now passed), the tax on truck diesel fuel will increase to 15½ cents per gallon.

Defendants have brought to the Court's attention the fact that in their view the Plaintiff-railroads enjoy other tax benefits which give them an advantage over other transportation competition and over other businesses. For example, section 422.25(10) of The Code exempts from Iowa sales tax:

> "The gross receipts from sales of tangible personal property used or to be used as railroad rolling stock for transporting persons or property or materials or parts thereof." (See also section 423.4(4) of The Code for a comparable use tax exemption.)

The railroads do not currently pay any Iowa sales or use tax on fuel consumed in their railway vehicles. It has also been brought to the Court's attention by Defendants that for Iowa property tax purposes the rate of assessed value for railroad property is carefully set at the lower of the rates existing for the assessment year for either commercial property, industrial property, or centrally assessed property (see section 441.21[10] of The Code). (Plaintiffs bring to the Court's attention and take the position that the claimed "advantage" of being assessed at lower levels was nothing more than the Iowa legislature recognizing that such favored treatment was warranted under the very section now being considered —section 11503. While conceding same for the sake of argument, the fact remains that there *is* what one must consider to be a tax advantage afforded to railroad property.)

As indicated above, Plaintiffs in support of their "discrimination" argument rely heavily on the fact that they feel they are being taxed for the consumption of fuel used in locomotives that are operated on their *own* right-

of-ways. In contrast, fuel taxed, for instance, for the use of truckers is used in turn to repair and maintain the very right-of-way that is used by the truckers. Stated another way, the Plaintiffs consider that the tax is unreasonable and is discriminatory since there are no recognizable benefits that the railroad will receive as a result of the tax imposed. In support of such proposition, the Plaintiffs have brought to the Court's attention two United States Supreme Court decisions, namely, *Evansville-Vanderburgh Airport Authority District v. Delta Airlines,* 405 U. S. 707, 712; 92 S. Ct. 1349, 1353; 31 L. E. 2d 620, 626 (1972); and *Massachusetts v. United States,* 435 U. S. 444, 446; 98 S. Ct. 1153; 55 L. E. 2d 403, 418 (1978).

In *Massachusetts, supra,* the state of Massachusetts brought an action contending that the United States could not constitutionally impose a tax that affected the state's function of operating a police force. Specifically, Congress enacted legislation which in part imposed an annual "flat fee" registration tax on all civil aircraft, including those owned by the states. The tax was imposed on Massachusetts law enforcement helicopters. This tax was part of a comprehensive program to recoup the cost of federal aviation programs from those who used the national air system. The Court held that the registration tax does not violate the implied immunity of a state government from federal taxation. At page 1166 of the Supreme Court decision it stated as follows:

> "We held that such taxes are valid so long as they (1) do not discriminate against interstate commerce, (2) are based upon some fair proximation of use and (3) are not shown to be excessive in relation to the

costs to the government of the benefits conferred." (*Delta, supra,* was cited as authority for such enumeration and legal statement.)

In *Delta, supra,* which was combined with an appeal also entitled *Northeast Airlines, Inc. v. New Hampshire Aeronautics Commission,* the United States Supreme Court was called upon to decide whether or not 1 dollar fees charged passengers enplaning commercial aircraft within the states of either Indiana or New Hampshire amounted to an unconstitutional burden on interstate commerce. The Court held that it was not, relying to some extent on the fact that the funds collected were used at least in part for the maintenance of airline facilities which in turn were used by the taxed passengers.

At the fear of being redundant, Plaintiffs herein have consistently argued that these tax funds are not contemplated to be used for any purpose that will in any way positively affect them and to the contrary their position is that they will adversely affect them. First off, it is not unconstitutional to tax a business and use the revenue to compete with the taxpayer (if in fact one can assume for the benefit of argument that there will in fact be competition of other railroad or railroads with the Plaintiffs). See *Pittsburgh v. Alco Parking Corporation,* 417 U.S. 369; 41 L.E.2d 132; 94 S.Ct. 2291 (1974); and *Puget Sound Power and Light Company v. Seattle,* 291 U.S. 619; 78 L.E. 1025; 54 S.Ct. 542 (1934).

Plaintiffs are mistaken if they consider that there must be some direct relationship between the tax imposed and any benefits received by them as a result of said taxes or the funds to which they are deposited.

The "controlling test . . . 'is whether the state has exerted its power in proper proportion to the taxpayer's activities within the state and to the taxpayer's consequent enjoyment of the opportunities and protection which the state has afforded' ". See *Colonial Pipe Line Company v. Traigle,* 421 U. S. 100, 108-09; 44 L. E. 2d 1; 95 S. Ct. 1538 (1975).

As indicated in Defendants' brief, the latest United States Supreme Court pronouncement on the permissibility of state taxaton of interstate commerce (*Commonwealth Edison Company v. Montana*—U. S.—69 L. E. 884; 101 S. Ct. 2946 [1981]), confirms that so long as the taxpayer engages in substantial business in the state the taxpayer can be required to pay state taxes even when no direct benefit is derived from the taxes paid. Plaintiffs here seem to labor under the "*incorrect assumption that the amount of state taxes that may be levied on an activity connected to interstate commerce is limited by the costs incurred by the state on account of that activity.*" (See *Commonwealth Edison, supra*—emphasis applied.)

It is also stated in *Commonwealth Edison, supra,* that it is only "when the measure of tax bears no relationship to the taxpayer's presence or activities in a state that a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the state is imposing an undue burden on interstate commerce".

It is undisputed in these proceedings and in the record herein that the respective Plaintiffs have a substantial nexus with the state of Iowa and that they are all in varying degrees actively engaged in business within the state of Iowa. It is also necessary and interesting to

note that the tax imposed herein is based on the fuel consumed as measured by the miles actually traveled in the state (the degree of activity within the state).

In any event, these Plaintiffs unquestionably own hundreds of miles of right-of-way in the state and derive millions of dollars of business within the state. They receive police and fire protection, access to the courts and they themselves have access to financial assistance in the rehabilitation of railroad tracks, road beds and tressels.

The Court has made an effort to examine and consider Chapter 307B as amended by House File 874, giving particular attention to the objects and purposes of said amended Act. As amended, the last unnumbered paragraph of section 307B.2 reads as follows:

> "It is a further intent of this chapter and of the generl assembly that, in order to preserve rail competition and to provide for railway services in this state, the authority work primarily with railroad carriers already providing service in this state based upon their willingness and ability to meet these objectives."

It is obvious in reading the amended Act that the Iowa legislature was making efforts to respond to a crisis situation having to do with the fact that railroad lines and trackage were being abandoned or that abandonment was eminent and that this would cause and have a crippling affect on several facets and types of industry within the state of Iowa, including agriculture *and* railroads (as a system).

Based on this record made, this Court finds that the preserved and improved condition of health of the total

railroad system within the State of Iowa would in fact bestow at least indirect benefits on the Plaintiffs in these proceedings.

In summary therefore, this Court determines and rules that the Plaintiffs have failed to meet their burden of proof that the imposition of the tax involved was discriminatory and had the effect, pursuant to 49 U. S. C. section 11503(b), of being an unreasonable burden against interstate commerce and thereby unconstitutional in violation of the Commerce Clause of the United States Constitution.

COMMERCE UNDULY BURDENED BY IRFA FRUSTRATION OF ABANDONMENT PROCESS

Plaintiffs argue that commerce is being unduly burdened by IRFA's frustration of the abandonment process, i.e., the fund created by this tax would be used to revitalize and make operative lines that the Interstate Commerce Commission has already determined should be abandoned as they constitute a burden on interstate commerce. Plaintiffs insist that the procedure anticipated by IRFA is merely shifting a burden (for purchase of and rehabilitation of abandoned lines) from a particular railroad to the industry as a whole.

Defendants on the other hand deny that their intended or actual efforts are designed at frustrating the ICC abandonment process primarily for the reason that no provision of the Interstate Commerce Acts *prohibits* a party from acquiring a railroad line that has been abandoned. Defendants insist that nothing on House File 874 empowers the Iowa Railway Finance Authority to

coerce or force railroad carriers into operating an abandoned line.

Defendants insist that House File 874 empowers the authority to issue bonds and provide financial assistance to private parties, including railroad companies like Plaintiffs herein to take a second look at and to make an economic analysis of abandoned lines to see if perhaps they should be rehabilitated or acquired.

The Court determines and rules that the Plaintiffs have failed to carry their burden of proof that the alleged objects and effects envisioned in the operation of HF 874 have or will have the effect of materially frustrating the abandonment process of the Interstate Commerce Commission to the point that same would be determined to be a burden on interstate commerce.

VIOLATION OF SUPREMACY CLAUSE BY REVITALIZING LINES THAT CONFLICT WITH NATIONAL TRANSPORTATION PLANNING

Plaintiffs take the position that pursuant to the 4-R Act the Secretary of Transportation has categorized rail lines with regard to "the degree to which they are essential to the rail transportation system" (45 U. S. C. section 823[b][1]. A major purpose of this process was to effect consolidation of lines and corridors with excess capacity and in furtherance of that purpose substantial federal funds were committed to the rehabilitation of what were deemed some of the most essential and viable lines in Iowa.

It is the position of the Plaintiffs that if the Defendants are permitted to resurrect or artifically sustain other

lines that such process will have the effect of diminishing the viability and fiscal soundness of the lines that have been found to be economically justified. Plaintiffs say further that for such reasons House File 874 stands as an obstacle to the accomplishment of Congressional purposes and therefore must yield to federal supremacy.

Defendants respond by first commenting on the policy or theory of pre-emption or supremacy. In *Chicago and Northwest Transportation Company v. Kalow Brick and Tile*, 67 L. E. 258, 265 (1981) the United States Supreme Court stated:

> "Pre-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or the Congress has unmistakenly so ordained."

It is the Defendants' position that Congress has not specifically indicated that states cannot rehabilitate abandoned lines.

It does not appear to be logical or reasonable that classification or categorization of rail lines by the Secretary of Transportation necessarily prohibits said lines from receiving a "second look" and from revitalization by private parties or by the state, or by assistance from the state, if such abandoned lines can be economically operated and can provide and fulfill a necessary complement to the total transportation picture of the state involved.

As indicated by the Plaintiffs:

> "The economics of smaller operation without the larger obligations of the common carrier makes short line operation feasible to someone other than a Class I carrier."

The language of House File 874 certainly is not mandatory but only permissive in consideration of the possible revitalization of previously abandoned lines.

The Court does not find that the Plaintiffs have carried their burden of proof to the effect that Congress has in fact pre-empted the whole question of treatment of abandoned lines and likewise has not carried its burden of proof to the effect that the provisions of House File 874 and the process of utilization of the tax provided therein for the express purposes of House File 874 and of Chapter 307B of The Code are in contravention or frustration of a national transportation policy or an obstacle to such policy. Having so determined, the Court rules that the Plaintiffs are not entitled to the relief requested pursuant to their claimed violation of the Supremacy Clause of the United States Constitution.

THE TAX IMPOSED BY HOUSE FILE 874 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT (ALSO UNDER THE UNIFORM LAWS REQUIREMENT OF THE IOWA CONSTITUTION)

Plaintiffs claim that House File 874 violates the Equal Protection Clause of the 14th Amendment to the United States Constitution and the Uniform Laws Requirement of the Iowa Constitution. This Court has already ruled that House File 874 does not materially discriminate against railroads and in favor of trucks, barges and other modes of transportation. The Plaintiffs question why they as an industry are singled out to contribute to a subsidy that is to be given to or at least will benefit other Iowa shippers.

Defendants respond that it is not improper to classify railroads into a particular or a special class for the purpose of taxation. Numerous cases are set forth on page 108 of the Defendants' brief in support of the proposition that "classification of railroads for the purposes of taxation differently from other businesses does not violate the 14th Amendment's Equal Protection Clause".

The defendants quote from *Klank v. Grimes,* 238 Iowa 495; 28 N. W. 2d 34 (1947), wherein the Iowa Supreme Court rejected an Equal Protection and Uniform Laws constitutional challenge to the Iowa Motor Vehicle Fuel Tax Law and stated in part as follows:

> "As an excise to be paid by user of motor vehicle fuel to propel vehicles on the highways of this state, the law operates with uniformity upon all within the class, and the equality and due process provisions of the state and federal constitutions are satisfied."

As indicated in Defendants' brief in that regard, "every railroad company operating locomotives within the state of Iowa will be subject to House File 874 excise tax for consuming fuel to propel such vehicles in the state of Iowa. The House File 874 tax treats all within the taxed classification (operating locomotives in Iowa) alike so as to satisfy the equality provisions of the Iowa and the United States Constitutions".

There is nothing in this record to indicate that railroads, whether they be intrastate or interstate are taxed or treated any differently under this Act. They all are required to pay tax on the fuel that they consume and use while operating their locomotives and other railway vehicles within the borders of the State of Iowa.

Plaintiffs have failed to carry their burden of proof to the effect that the Equal Protection Clause of the United States Constitution or the Uniform Laws Requirement of the Iowa Constitution have been violated or will be violated if the tax under House File 874 is permitted to be collected and the other provisions of the Act enforced.

HOUSE FILE 874 IS UNCONSTITUTIONAL UNDER THE PUBLIC PURPOSE REQUIREMENTS OF THE IOWA CONSTITUTION

Article III, section 31 of the Iowa Constitution provides:

> "No public money or property shall be appropriated for local or private purposes unless such appropriation, compensation or claim be allowed by two thirds of the members elected to each branch of the General Assembly."

It is not even argued in these proceedings that a two-thirds vote was obtained for the purpose of avoiding the effects of the aforementioned constitutional provision.

Plaintiffs contend that enactment and enforcement and eventual effect of House File 874 is for a private as opposed to a public purpose and is therefore unconstitutional under the aforementioned and quoted Iowa Constitutional provision. Both parties (and particularly the Defendants) have brought to the Court's attention portions of the language of House File 874 and of certain sections of Chapter 307B of The Code. As examples, section 307B.2 of The Code (as amended by House File 874) provides in part as follows:

> "Declaration of Necessity and Purpose. The purpose of this chapter is to benefit the citizens of Iowa

> by improving their general health, welfare and prosperity and ensuring the economic and commercial development of the state and by promoting agricultural and industrial improvement. Access to adequate railway transportation facilities is essential to the economic welfare of the state . . ."

§ 307B.3 of the Code (as amended by House File 874) is rather outspoken and direct on this question. Subsection 11 of same reads as follows:

> "All of the purposes stated in this section are public purposes and are uses for which public monies may be borrowed, expended, advanced, loaned or granted."

Plaintiffs take the position that such a statement or statements do not in themselves have the effect of changing a sow's ear into a silk purse, that is make a private purpose a public purpose. The Iowa Supreme Court in *Simpson v. Low-Rent Housing Agency of Mount Ayr,* 224 N. W. 2d 624, 627 (Iowa 1974), held that:

> When reviewing a statute challenged under the public purpose clause of the Iowa Constitution, Article III, § 31, the Court while "not required to treat a legislative declaration purpose as final, binding or conclusive . . . will not find absence of public purpose except where such absence is so clear 'as to be perceptible by every mind at first blush'. *Dickinson v. Porter* 240 Iowa 393, 417; 35 N.W.2d 66, 80 (1948)." See also *Grubb v. Iowa Housing Finance Authority,* 255 N. W. 2d 89, 93 (Iowa 1977), and *Green v. Mount Pleasant,* 256 Iowa 1184; 131 N. W. 2d 5 (1964).

As stated in *Grubb, supra,* in commenting on the burden on Plaintiffs to establish lack of public purpose in the face of legislative findings to the contrary, it was held that same is especially difficult to satisfy because of the "plain judicial intent to permit the concept of 'public purpose'

to have the flexibility and expansive scope required to meet the challenges of increasingly complex social, economic and technological conditions".

After giving due consideration to the language of and expressed purposes and intends of Chapter 307B of The Code as amended by House File 874, this Court determines and rules that the Plaintiffs have failed to meet their burden of proof that House File 874 is a private purpose enactment as opposed to a public purpose enactment and has further failed to prove that such tax law violates the public purpose provisions of the Iowa constitution.

HOUSE FILE 874 UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE BY IMPOSING A TRANSIT FEE FOR MOVEMENT ON OUT-OF-STATE SHIPPERS

Plaintiffs take the position that imposition of this tax can be likened to a state duty or import-export fee. The Court was referred to *Michelin Tire Corp. v. Wages*, 423 U.S. 276; 96 S.Ct. 535; 46 L.E.2d 495 (1976). Therein, the Court examined the historical impetus for the scheme of commercial regulation established by the federal constitution. In drawing upon this history, as well as other sources, the Court concluded that one of the three principal reasons for the prohibition of state duty and imposts on imports and exports was that:

> ". . . harmony among the states might be disturbed unless seaboard states with their crucial ports of entry were prohibited from levying taxes on citizens of other states by taxing goods merely flowing through their ports to the other states not situated as favorably geographically."

To call this tax an import or export fee such as the evils sought to be corrected in the historical cases referred to in *Michelin, supra,* requires some substantial stretch of imagination. As indicated before, in Deposition Exhibit 127 only about three of the United States rank below Iowa in taxes per mile paid by railroads (in the year 1978). Also as indicated before, a collection of 15 million dollars in revenues from this purpose would only place Iowa just above the average of the United States. (Actually if this Court's computation is correct, we are talking about an additional collection of only 8 million at the highest assessment authorized by House File 874.)

Likewise, again in reference to Deposition Exhibit 127, the imposition of this tax would have a negligible effect on the percentage of traffic loss.

The test of validity is whether the tax discriminates against or unreasonably burdens interstate commerce. This Court has already determined in these proceedings and in this ruling that the tax imposed does not materially discriminate against interstate commerce and is not materially an unreasonable burden on interstate commerce.

This Court therefore determines and rules that the Plaintiff has failed to meet its burden of convincing this Court that the tax involved under House File 874 exploits out-of-state shippers by imposing upon them a transit fee for movement though Iowa, has failed to convince this Court that same amounts to an import or export duty or fee, and failed to convince this Court that such tax for those reasons is a burden on interstate commerce and a taking of the property of the Plaintiffs without due process of law.

THE TAX IMPOSED BY HOUSE FILE 874 DISCRIMINATES AGAINST PLAINTIFFS BECAUSE THEIR COMPLIANCE BURDENS ARE GREATER THAN THOSE OF PURELY LOCAL RAILROADS

In this Court's view, *Western Livestock v. Bureau of Revenue,* 303 U. S. 250, 254; 82 L. E. 823, 827; 58 S. Ct. 546; 115 ALR 944 (1938), is right on point and is directly against the proposition proposed by Plaintiffs. In *Western Livestock,* the Supreme Court stated:

> "It is not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business . . ., and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business."

Plaintiffs by their own choice chose to function and operate and do business in various states. If their choice of conducting interstate commerce requires them to prepare documents and compute their tax obligation responsibility in each of the states involved, so be it. It is a consequence of doing business in more than one state and most certainly is not a discrimination that would render the imposition of the tax an unconstitutional burden on interstate commerce or deprivation of property without due process.

The Plaintiffs have failed to carry their burden of proving that the requirement of additional compliance, expense or related activity unconstitutionally discriminates against them as opposed to purely local railroads.

THE TAX IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS BECAUSE OF VAGUENESS, UNREASONABLE DIFFICULTY IN APPLICATION AND CONFISCATION OF TAXPAYERS' FUNDS TO COMPLY

Perhaps the most difficult problems confronted by the Court in these proceedings deals with the subject matter above indicated. Considerable of the testimony evidence and depositions in these proceedings had to do with how certain employees of the Defendant and other experts for respective sides viewed the terminology involved in the Act involved and how they felt that it could or could not be applied as a tax-raising measure.

The Iowa Supreme Court noted in *Lee Enterprises, Inc. v. Iowa State Tax Commission,* 162 N. W. 2d 730-739 (Iowa 1968), an excise tax case:

> "Only when the Act is so indefinite and uncertain that the Courts are unable, by accepted rules of construction, to determine with any reasonable degree of certainty what the legislature intended, or when it is so incomplete and inconsistent that it cannot be executed, that the law will be invalidated as indefinite and uncertain."

The Iowa Supreme Court in *Lee Enterprises, supra,* cited as authority for such proposition *State v. Coppes,* 247 Iowa 1057, 78 N. W. 2d 10 (1956), and other cites. The above quote and the proposition of law stated therein undoubtedly came from page 1062 of the Iowa citation in *Coppes, supra,* but it was stated in a reverse manner as follows:

> "In 25 R. C. L. Statutes, Section 62, page 810, referring to the fundamental rule governing the validity of a

> statute, it is stated that if it is couched in language 'so vague, indefinite and uncertain that the Courts are unable to determine, with any reasonable degree of certainty, what the legislature intended, or is so incomplete or is so conflicting and inconsistent in its provisions that it cannot be executed, that it will be declared to be inoperative and void.'"

Coppes, supra, which dealt with the constitutionality of an Iowa statute prescribing speed limits has a couple of more statements that are important for this Court's understanding of its duty and responsibility in these proceedings. The following quotes appear on page 1066 of the Iowa citation:

> "In *State v. Andrews,* 108 Conn. 209, 213, 142 Atlantic 840, 841, the Court said: 'In most jurisdictions statutes will not be held void for uncertainty if a practicable or sensible effect may be given to them.'
>
> "In *State Ex. Inf. Crow v. West Side Street Railway Company,* 146 Mo. 155, 167, 168, 47 S. W. 959, 961, the Court said: 'A statute cannot be held void for uncertainty, *if any reasonable and practical construction can be given to its language.* Mere difficulty in ascertaining its meaning or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its proper construction will not justify us in disregarding it. It is the bounden duty of the Courts to endeavor by every rule of construction to ascertain the meaning of and to give full, force and effect to every enactment of the General Assembly not obnoxious to constitutional prohibitions." (Emphasis applied)

Another instructive quote from *Lee Enterprises, supra,* dealing with this Court's burden is set forth on page 738 of the Northwest citation as follows:

> "The general rule applicable here is that one challenging the constitutionality of the legislative act on

these grounds has the burden of establishing that the Act is unconstitutional and *must negative every reasonable basis which may sustain the statute.*" (Cases cited—emphasis applied)

Iowa Rule of Civil Procedure 14(f) (13), Iowa Rules of Appellate Procedure, indicates:

"In construing statutes the Court searches for the legislative intent as shown by what the legislature said rather than what it should or might have said."

In these proceedings, as indicated above, Plaintiffs offered the testimony of some State Department employees called as their witnesses as to the interpretation and possible application of some of the terms and provisions of the Tax Act involved. In a somewhat similar situation, the Iowa Supreme Court in *Iowa State Education Association v. PERB,* 269 N. W. 2d 446 (Iowa 1978), stated as follows at page 448:

"In order to search out legislative intent the PERB heard testimony of three members of the General Assembly who had been active in the enactment of the statute. These witnesses, on the basis of their legislative experience, offered opinions on the subject of legislative intent.

On a number of occasions we have seen records where legislators gave similar testimony. At first blush it might seem reasonable to rely upon an individual legislator's opinion of legislative intent. *But we believe such testimony is generally unpersuasive.*

The legislative process is a complex one. A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. What impelled another legislator to vote for the wording is apt to be unfathomable.

> Accordingly we are usually unwilling to rely upon the interpretations of individual legislators of statutory meaning.
>
> This unwillingness exists even where, as here, the legislators who testify are knowledgeable and entitled to our respect. See generally 2A Sutherland Statutory Construction, 48.16, p. 22 (Fourth ed. 1973).
>
> We have long applied the rule that 'in construing statutes the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said.' Rule 14(f) (13), Rules of Appellate Procedure.
>
> *We pass the testimony of the legislators and turn to the more traditional tools of statutory construction.*" (Emphasis applied)

The Court has examined particularly the testimony of Cynthia Eisenhauer, Director of Excise Tax for the Iowa Department of Revenue (beginning in Volume I, Abstract of Record, page 113), that of Carl Anthony Castelda, II (beginning in Abstract of Record, Volume II, at page 36 and in Abstract of Record, Volume III, beginning at page 52), and that of George C. Shaffer, a transportation consultant (Abstract of Record, Volume III, beginning at page 76).

Other witnesses testified for the respective parties concerning somewhat the same subject matter. Both Eisenhauer, in the hearing relative to the Temporary Injunction, and Castelda, by deposition, were called by the Plaintiffs. Castelda later testified in the trial on the merits, as did Shaffer, for the Defendants.

These witnesses to varying degrees testified to such matters as their opinion as to what is included in the definition of "railroad vehicles", "dispensed", "within/

without the State of Iowa", "metering" requirements, and some did to a certain extent make a comparison of the statutory language with Exhibit 22—the monthly report form.

Plaintiffs in these proceedings and in their brief have made much of the fact that there is not a great deal of consistency between these respective witnesses concerning their opinions as to definitions and as to application of the law and the filling out of the report form.

However, as indicated above, in *Iowa State Education, supra,* "such testimony is generally unpersuasive".

This Court would observe, however, that there is in fact considerable and general agreement among these respective witnesses concerning the aforementioned definitions and to some less extent their application in a formula and in filling out Exhibit 22 in these proceedings.

The Iowa Supreme Court in *American Home Products v. Iowa State Board of Tax Review,* 302 N.W.2d 140, 142-143 (Iowa 1981), set forth a number of traditional rules of statutory construction utilized in tax cases. Before setting forth seven enumerated rules of statutory construction, beginning on page 142 of *American Home, supra,* the Court stated:

> "The purpose of all rules of statutory construction is to *ascertain the intent of the enacting legislature. Iowa National Industrial Loan Co. v. Iowa State Department of Revenue,* 224 N. W. 2d 437, 439 (Iowa 1974). (Emphasis applied)

The Court does not consider it necessary to set forth the aforementioned and enumerated seven rules of statutory construction.

Sections 22 through 29 of the Act shows a manifest legislative intent and purpose to impose the excise fuel tax upon the consumption of fuel by "railway vehicles" in the State of Iowa for propulsion purposes. The tax applies to consumption of fuel in *locomotives* within the State of Iowa.

"Fuel" is defined in Section 23 of the Act. It does not appear in these proceedings that there is any serious question or doubt as to what type of "fuel" is the subject of this tax measure.

"Department" and "railroad company" are also defined, and there does not appear to be any *serious* question as to what is meant by those two particular terms.

Subsection 3 of Section 23 of the Act defines "railway vehicle" as meaning a vehicle designed and used primarily upon railways for self propulsion or for propelling conveyances.

The Defendants take the position that particular emphasis should be put on the words "used primarily" and that while locomotives would clearly fit within the definition of "railway vehicle", track maintenance equipment would not fall within such definition because they are not designed and used primarily for self propulsion or for propelling conveyances.

This proposition was succinctly stated by Defendants at page 14 of their Brief as follows:

> "Any ambiguity in the definition of 'railway vehicle' should be resolved in favor of the taxpayer. *Associated General Contractors v. State Tax Comm'n*, 255 Iowa 673, 123 N. W. 2d 922 (1963). *Therefore, track*

maintenance self-propelled vehicles do not constitute 'railway vehicles' as defined in section 23(3) of House File 874 and consumption of fuel by such vehicles in Iowa is nontaxable. To say otherwise would lead to an absurd interpretation of the tax law."

Another term that has perhaps caused some confusion within this tax law and its application is the word "dispense". The word is used in section 24 in reference to the requirement of metering. It is also used in section 26 which has reference to the tax computation and is specifically used in numbered paragraphs 1 through 5 and in an unnumbered paragraph which provides for the computation of the tax.

Its particular importance in these proceedings is that it is used in connection with the requirement of "metering". That subject in turn precipitated substantial testimony and evidence in these proceedings as to, first, the difficulty if not impossibility of a metering process and more important the alleged tremendous capital expenditures that would be required if the railroads were required to "meter" all fuel used.

The State takes the position that fuel is "dispensed" when it is *delivered,* and fuel can be delivered into storage or into a locomotive. Exhibit 13 is a letter dated November 16, 1981, from G. D. Bair, Director of Iowa Department of Revenue, to F. L. Riley, a Director of Tax Accounting for the Plaintiff A. T. S. F. In this letter Bair expresses the Department's view that only fuel dispensed *in this state* is subject to metering. He also states the Department's view that this "dispensing" could be either into a railway vehicle or into a storage facility and that if it is done by a fuel supplier it would undoubtedly be

metered by that supplier and the invoices concerning same could be used by the railroad without the necessity of it itself likewise "metering" the fuel as it is "dispensed" either directly into a railway vehicle or into a railway storage facility. The Court would observe that the Defendants appear to be putting particular emphasis on the fact that for the most part when the word "dispense" is used it is used in connection with the following words "in Iowa". The only exception to that appears to be in subsection 5 of Section 26 where it is used in the following context:

> "5. The total gallons of fuel dispensed outside Iowa and placed into railway vehicles traveling within without the State."

The State's position that whenever the word "dispense" is used it has reference to fuel that is either placed by a supplier either directly into a railway vehicle or into a railway-owned fuel storage facility would seem to be logical and reasonable with the exception of the aforementioned quoted subparagraph 5. The State offers explanation for that one apparent inconsistency by taking the position that fuel "dispensed" outside of Iowa is not required to be metered but that the definition would follow that "dispense" still means fuel placed directly into a railway vehicle or placed into a railway-owned storage facility.

However, the one distinction might be that the fuel "dispensed" outside of Iowa might not be metered, depending on the specific statutory requirements of the states other than Iowa.

It is the Court's decision at this time to comment about the comparison that Defendants made beginning on page

16 of their Brief in regards to the requirements of Exhibit 22 as compared with the required information to be supplied in Section 26 of the Act. The purpose of this comparison is to determine whether or not the Act is so indefinite and uncertain that the Court is unable to determine the legislative intent or that it is so incomplete and inconsistent that it cannot be executed (see *Lee Enterprises, supra*).

It is the position of the Defendants that the first item in Section 26 (the total gallons of fuel dispensed in Iowa) and line 1 of Exhibit 22 (total gallons of fuel dispensed in Iowa) simply represents the railroad company's monthly purchases of locomotive diesel fuel delivered by a supplier either into a railroad-owned storage facility or delivered directly into a railway vehicle. This fuel would be metered and invoices would be available to support same.

The second item in Section 26 of the bill (the total gallons of fuel dispensed in Iowa and placed in railway vehicles used solely within the State during the reporting period) corresponds with line 3 of Exhibit 22 (total gallons of fuel dispensed in Iowa for use in vehicles traveling solely within Iowa). Hereinafter there will be a method proposed to determine the amount of fuel used and to be taxed regarding line 3 of Exhibit 22. However, in all honesty it is unlikely that any sizeable amount, if any, of fuel would fall into this limited category.

The third item in Section 26 (the total gallons of fuel dispensed in Iowa for nontaxable purposes) corresponds with line 2 of Exhibit 22 (the total gallons of fuel dispensed in Iowa for nontaxable purposes). It is possible that a

railroad might well have some specific figures for this category, if in fact it could prove that some fuel was dispensed for nontaxable purposes, such as fuel sold to another railroad, fuel used to heat buildings, fuel used in maintenance equipment, and perhaps some reasonable estimate for spillage, particularly if this was a one-time sizeable occurrence. For the most part, however, this Court observes that the nontaxable fuel more than likely would be the product which results from some computation of estimated fuel used solely within the State subtracted from total gallons of fuel dispensed in Iowa.

The fourth item in Section 26 (the total gallons of fuel dispensed in Iowa and placed in railway vehicles used within and without the State) corresponds with line 4 of Exhibit 22 (total gallons of fuel dispensed in Iowa for use in vehicles traveling within and without the State of Iowa). Accepting the Defendants' position as to what "dispense" means, item 4 of Exhibit 22 would represent fuel delivered by a supplier within the State of Iowa and metered by said supplier into a railway vehicle or into a railway-owned storage facility and then actually (but not necessarily metered) delivered into a railway vehicle that during the reporting period traveled both within and without the State of Iowa. Determination of the figure to be inserted into paragraph 4 of Exhibit 22 would require some method of determining the estimated amount of fuel used for such purposes.

The fifth item in Section 26 (the total gallons of fuel dispensed outside of Iowa and placed into railway vehicles traveling within and without the State) corresponds to line 5 of Exhibit 22 (total gallons of fuel dispensed outside

of Iowa for use in vehicles traveling within and without the State of Iowa). As indicated above, fuel "dispensed" outside of Iowa would not have to be metered. Such fuel represents fuel that was placed in a railway vehicle that during the reporting period traveled both within and without the State of Iowa. Again, it is required and necessary that some method of determining the estimated amount of fuel so used be utilized.

As indicated in Defendant's Brief, the second, fourth and fifth items in Section 26 would require the reporting of total gallons of fuel dispensed into locomotives which were used for *propulsion of railway vehicles.* The Defendants take the somewhat restrictive and conservative view (giving the taxpayer the benefit of the doubt) that locomotives when they are "idling" would not be used for propulsion purposes and the fuel used during "idling" would not be taxable.

Beginning on page 39 of Defendant's Brief and based apparently on the testimony of Mr. Castelda, Defendants and Castelda proposed a six step procedure for computing line 5 of Exhibit 22, which as indicated above represents total gallons of fuel dispensed *outside* of Iowa for use in vehicles traveling within and without the State of Iowa.

The first step of the proposal would be the determination of total system fuel for the railroad involved for the reporting month involved. This could generally consist of a system wide dispensation of fuel into fueling locations by vendors or directly into locomotives by vendors. This information is now reported annually in the R-1 reports (see page 111 of Defendants' Exhibit 6—Annual Re-

port for Burlington Northern for the year 1980). That page and form indicates that BN used fuel totaling 490 million gallons for the year 1980. It also indicates that work train gallonage of 904 thousand was used.

The next step requires a determination of system miles for the railroad involved and for the month involved. Again, the railroads are required by the ICC to prepare on an annual basis a compilation of the locomotive unit-miles of their locomotives in each state. As an example, the Iowa information for the year 1980 for BN again appears in Defendants' Exhibit 56 and is identified on page SC-18. This report indicates total locomotive unit-miles of 8 million plus for the year 1980. Also, it indicates train-miles work trains in the amount of 30,787.

The third proposed step is mathematically the division of the system fuel figure by the system mileage figure, which results in an average gallons per mile system wide. Plaintiffs would argue and there was evidence presented to the effect that such a figure should not be used to reflect, or be a part of any computation which has the purpose of reflecting gallons of fuel used in Iowa. The reason is that such a figure does not reflect what might be substantial differences in terrain, in total train speed, in total train load, and the particular driving and operation methods of the engineer involved, etc. Based on the evidence in these proceedings, however, this Court would determine and rule that such individual characteristics and factors would not so distort the eventual tax imposed as to make the tax imposed indiscriminate and unconstitutionally sound. Such differences as they exist and to the ex-

tent that they exist could certainly be a part of a railroad's alternate proposal.

Step four of the proposal requires the identification of locomotives that were never in Iowa during the reporting period. In this day of technology and computerization, it does not appear to this Court to be anything close to an insurmountable or even extremely expensive process for a railroad to compile information that would reflect what of its locomotives either were or were not in the State of Iowa during a particular month. In truth and fact this Court is sure that most, if not all, of the railroads presently keep such type of information for their own records and information.

The next step in the proposal requires first the determination of the miles traveled by the identified locomotives in step four for the period involved. In that regard, the Court would state that it is reasonable and plausible and certainly possible that if one is required to keep information for and to prepare reports that reflect the total system miles of locomotives for a year this would indicate that such information can and more likely is kept for an individual locomotive, and further, if it is kept for an individual locomotive for a year, it could likewise be computed for an individual locomotive for a month. Such being the case and once that figure is determined, it could be multiplied by the number of locomotives identified in number four. The proposal suggests that those number of miles (i. e., miles during the reporting system attributable to locomotives that never enter the State of Iowa during the reporting month) be multiplied by the average gallons per mile (step three) and the result would equal gallons of fuel used by locomotives during the reporting period that never entered the State of Iowa.

Step six of the proposal requires one to first determine the total fuel dispensed into system locomotives outside the State of Iowa for the reporting period and for the railroad involved. Again, if it is required that such information be maintained and obtained for the preparation of system fuel on a yearly basis, and fuel of necessity has to be dispensed within a respective state, either into a holding receptacle or into a locomotive, it should be reasonably possible to compute on a monthly basis the amount of fuel dispensed, as indicated above, by a particular railroad into all of its locomotives and in all states other than the State of Iowa. The proposal indicates that once that figure is determined the figure determined in step five, i.e., gallons of fuel dispensed into locomotives which never entered Iowa during the reporting month, would be subtracted, and the resultant figure would be the figure required for completion of paragraph number 5 of form 22, i.e., total gallons of fuel dispensed outside of Iowa for use in vehicles traveling within and without the State of Iowa.

As one proceeds down form 22, the Court agrees with the Defendants that the next step is obvious, i.e., the totaling of items 4 and 5, and the resultant figure 6 represents the total gallons of fuel used in vehicles traveling within and without the State of Iowa.

The next point of controversy deals with the computation of the percentage. It is the Court's opinion that the purpose of the computation and use of such percentage is to assure as best possible that the taxpayer is not required to pay tax on fuel that was used ouside of the State of Iowa and to further show the

taxpayer that the tax imposed and paid in the State of Iowa has a direct reflection on the extent of business conducted by the railroad in the State for the reporting period involved.

This computation first requires the determination of the total miles traveled in Iowa. This Court is of the opinion that that means the monthly figure which compares with the annual figure that appears in Schedule SC-18 of Defendants' Exhibit 56 for the BN Railroad. The Court should note that it is not necessary that a railroad necessarily use and follow the same process and make the same assumptions that are used in making and preparing a Schedule SC-18 but only suggest that such is a process that could be used for such purpose. According to the testimony, the process used in the preparation of SC-18 first deals with the concept of locomotive unit-miles. Edward Burkhardt of the CNW described a locomotive unit mile as follows:

> "Q. Explain what locomotive unit miles is. What does that mean?
>
> A. Well, as an example, if a locomotive has three units and operates 100 miles, we're going to develop 300 locomotive unit miles on that trip."

Michael Iczkowski, as indicated above, was called as a witness (on deposition) by the Defendants. He was previously identified as a senior analyst in the operations planning department of CNW. He testified concerning the process used for determining locomotive unit miles concerning train switching and yard switching. He testified as follows:

> "Q. In the four categories that we have been discussing of locomotive operations, is mileage

developed by the Northwestern for each individual locomotive unit?

A. Using the methodology that I have described, namely for road unit miles, you take point to point mileage. For train switching and yard switching, you take the hours in service times six. Yes, they do have records for individual locomotive units.

Q. And then would it be the aggregate of those individual records that would give you your total locomotive unit miles for each of the four catagories?

A. Right."

Iczkowski testified further on deposition concerning the computation of locomotive unit miles as follows:

"Q. Now, to your knowledge does the North Western determine in any manner locomotive miles for through freight operations?

A. We do have computer records of locomotive unit miles which are generated from the—I believe the conductor's wheel report. And we also have—some of these records also include estimated train switching locomotive unit miles.

Q. The train switching locomotive unit miles, is that also on the conductor's wheel report?

A. It's generated from the conductor's wheel report, yes.

Q. What about way freight, do you determine mileage on way freight also?

A. Yes, the locomotive unit miles for the through freight as well as the way freight are all determined in the same manner. It's point to point mileage from the conductor's wheel report.

Q. That's the source document, in other words?

A. Yes.

Q. Is that the only source document?

A. For that particular record, yes.

Q. Both —

A. It's the primary report, the only input for it.

Q. In other words, for both through freight operations —

A. Right.

Q. — and way freight operations?

A. Right. The computer in calculating the unit mileage doesn't really discriminate between a way freight and a through freight. It's a train, a train being a locomotive and/or cars which operate between stations, over the road.

Q. Mr. Iczkowski, are you familiar with what has been marked in this proceeding as Exhibit 204. It's a schedule 931 statistics.

A. Yes.

Q. Now, you mentioned, I believe, yard. Does yard include only switching or does it include other type of operations?

A. No, yard is just local switching operation.

Q. It's switching?

A. Solely local switching right. It does not include any road service.

Q. All right. Do you develop any yard switching miles for locomotives?

A. Yes, we take the—I believe it's the yard engineer's time return or the conductor—the yard conductor's time return and the number of hours on duty are multiplied by the number

of locomotives assigned to the particular yard engineer and then multiplied by a factor of six to determine estimated miles traveled—unit miles traveled in yard service.

Q. And in train switching to determine those miles, do you also use that type of formula?

A. The same basic formula. Only you take the —again, it's the road conductor or engin-er's time return, you multiply by the number of locomotives on the wheel report times six to get an estimate."

The reports prepared and regularly kept by the railroads and referred to by Mr. Burkhardt and by Mr. Iczkowski are the source materials, or could be the source materials for compilation of the information required in determining the total miles traveled in Iowa by the respective railroad during the reporting month.

The next item to be computed is identified as 7B, i.e., total miles traveled within and without Iowa. Using the same process, the same source materials and compiling the comparable records for all locomotives of the railroad that were used in the compilation of 7A (i.e., locomotives that at some time travel within the State of Iowa), it will be possible to compile the information required to complete item 7B. 7B, to this Court's understanding represents the total miles traveled (regardless of geographical location) during the reporting period by locomotives that travel to some extent within the State of Iowa, and such Iowa travel is reflected in 7A.

Form 22 then requires that the 7A item be divided by the 7B item and the resultant figure be multiplied by 100 to produce a percentage. This appears to be in reasonable conformity with (albeit in this Court's view a somewhat clumsy process) the requirements of the statute involved which refers to a "fraction, the numerator of which is miles traveled in Iowa by railway vehicles traveling within/without Iowa and the denominator of which is the total miles traveled by the same railway vehicles."

Form 22 then requires the taxpayer to multiple the item 6 gallons by the indicated percentage and then add that resultant number of gallons to the gallonages indicated in item 3, resulting in the total number of gallons to be taxed. The form then goes on and requires imposition of a 3 cent per gallon tax (as indicated above, that figure now by passage of time would be in the amount of 8 cents per gallon).

The purpose of this Court's extended discussion of the proposals and the attempted explanation as to how this tax could be computed and enforced and perhaps more importantly the types of materials and records that should be readily available to the railroad to comply with this Act is to determine whether or not the tax imposed and the statute involved is so vague and so unreasonably difficult in application as to be an unconstitutional denial of due process.

As indicated in *Iowa National Industrial Loan Co. v. Iowa State Department of Revenue,* 224 N.W.2d 437 (Iowa 1974), the Iowa Supreme Court at page 442 of the Northwest citation stated as follows:

> "It is well settled that one of two possible interpretations leads to unconstitutionality and the other to constitutionality. We must adopt the view which upholds rather than defeats the law."

The same Court in the same case on the same page when discussing the use of the word either "may" or the word "shall" went on to state:

> "Conversely, we believe 'may' shall be construed to be mandatory rather than permissive, *if that were necessary to preserve the constitutionality of Section 422.37(1).*"

Again, this is strong, instructive language of our Appellate Court as to what Plaintiffs might consider to be extreme lengths the Court must go in attempting to preserve the constitutionality of questioned statutes.

The Plaintiffs have failed to carry their burden of proving that the statute involved is so vague and so unreasonable difficult in application as to be an unconstitutional denial of due process.

The other problem area referred to in this particular division or portion of the ruling deals with the question as to whether or not there has been an unconstitutional confiscation of railroad property, i.e., are unreasonable and exorbitant expenditures required to comply with this law. Substantial of this record dealt with testimony of railroad witnesses as to what they would consider to be astronominical required expenses if in fact they were required to meter fuel as it goes into locomotives. In the same light, estimates of considerable expense were given if they are required

to have some form of elaborate mechanism on the locomotives that would indicate at any one given time the amount of fuel remaining in its locomotive storage tanks so as to permit some estimate of use as it passed perhaps into and out of the State of Iowa. In the same light, estimates of extreme expense were given by railroad witnesses concerning miles traveled devices (odometers?) on locomotives. We note that such devices would not necessarily be of particular importance if one were measuring distance between stations, but it certainly would be helpful in measuring the distance traveled by locomotives within switch yards and in train switching oprations. There is also testimony and argument given to the Court to the effect that considerable additional help and the commensurate expense concerning same would be required if the railroads were to reasonably and with any degree of accuracy measure "idle in tow" and "dead in tow" locomotive operations.

In regards to metering, the Court has stated before in this decision that metering approval is only required in regards to fuel that is dispensed within the State of Iowa and that would be either into a railroad-owned storage facility or directly into a locomotive. Again, as indicated above, that would undoubtedly come from a fuel dealer and would be metered by them as opposed to being specifically metered by the railroad. While

metering might be of some assistance to the railroad and this record would indicate that all of them are involved to some extent in that process, it certainly is not a requirement and is not the basis for any required and necessary substantial expenditure of funds on the part of the railroad.

In regards to the necessity and expense commensurate with the use and the obtaining of some kind of an odometer device, the Court has hereinbefore indicated that there are other methods and other reports presently available and required from which a reasonable estimate of miles traveled can be obtained without the necessity of or the expense of the implimentation of some kind of an odometer device to measure miles traveled by a locomotive. Again, this is not the basis of required and unreasonable expenses as far as compliance is concerned.

It is true that some additional expenditure of personnel will be required for the railroads to determine, with any degree of accuracy, to what extent locomotives are "idle in tow" or "dead in tow". However, it is conceivable and possible that some of this information is already being collected by the railroads, and in any respect any additional expenditures in that regard would certainly not be so confiscatory such as to render this statute unconstitutional as being a deprivation of property without due process.

This Court therefore determines and rules that the Plaintiffs have failed to meet their burden of proof that the imposition of this tax and its requirements amounts to a confiscatory deprivation of railroad funds without due process and it is not therefore in violation of the Constitution of the United States.

Before moving on to other matters, it is necessary for the Court to comment about two other questions that were raised concerning the computation of the tax and its application. As will be noted in the above comment by the Court concerning the computation of the tax and in particular in the determination of the system mileage and the Iowa mileage, reference was made to the SC-18 form which is contained in the R-1 reports. In the compilation of locomotive unit-miles, train switching miles and yard switching miles used a 6 mile an hour average for such computation. The Railroad Plaintiffs seriously question the accuracy of such 6 mile factor and in support of such objection offered into evidence Exhibits 206 and 207. 207 is a letter from Chicago & Northwestern Railroad to a representative of the Interstate Commerce Commission wanting to know the basis for the 6 mile an hour average used for calculating locomotive unit-miles for yard and train switching services. 206 is the response from a representative of the Interstate Commerce Commission to such request for information. The important part of said response is as follows:

> "Unfortunately, we are unable to locate in our files specific documentation on the original establishment of this factor. However, the factor has been used for many years and has general acceptance for the purpose for which it is used in rail costing."

It certainly would have been beneficial to these proceedings if we could have had a more definitive and positive response or answer than was indicated in Exhibit 206. It was also indicated in these proceedings that some of the expert witnesses called are even now involved in programs and studies aimed at developing a more credible process of determining switching and yard mileage.

On the other hand, to this Court's recollection the Plaintiffs were not able to come up with any alternative procedure that would warrant the at least present discontinuance of the 6 mile per hour factor for the determination of switching and yard mileage. In any event, use of that factor is not such as in this Court's view and opinion would produce such a variance in tax collection as would cause it to be discriminatory and unconstitutional.

The Plaintiff-Railroads also contended that the tax was unworkable because of their use of "pooling agreements" with other railroads. The Defendants' response, which this Court is willing to accept, was that the statute involved imposes the tax on the consumption of fuel by the railroad company and that the Defendants interpret this to mean fuel consumed when the locomotive is operated by the taxpayer railroad company and not by someone else. It is this Court's understanding that mileage incurred by railroad locomotives while they are involved in a pooling agreement is not included in the mileage statement (contained in R-1) of the owner of the locomotive but rather it is included in the like instrument for the other railroad involved in the pooling agreement.

In any event, not taxing the owner-railroad for fuel consumed when a particular locomotive is being operated by another railroad is a reasonable construction of the tax law. This Court adopts such construction in an effort, if same is necessary, to uphold rather than defeat this statute (see *Iowa Natural Industrial Loan Co., supra*).

HOUSE FILE 874 VIOLATES THE COMMERCE CLAUSE AND THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES BECAUSE IT TAXES FUEL CONSUMED OUTSIDE OF THE STATE OF IOWA

The Due Process Clause forbids State taxation of activities which lack any substantial nexus with the taxing State. The Commerce Clause also limits such activity because interstate commerce needs protection from discriminatory burdens and from the danger of multiple taxation of the same activities or values by different States.

Plaintiffs claim that they pay sales or use tax on diesel fuel which is later consumed in the State of Iowa and taxed by the State of Iowa and that such process amounts to an impermissible double taxation on the same product.

Defendants counter that the tax imposed under House File 874 does not amount to impermissible double taxation.

In *Dain Manufacturing Co. v. Iowa State Tax Commission*, 237 Iowa 531, 22 N.W.2d 786 (1946), the Iowa Supreme Court discussed and explained the complimentary nature of the Iowa Sales and Use Tax scheme as follows:

> "The purpose of the use tax law is indirectly to tax sales that cannot be directly taxed under the Iowa sales-tax law. Since sales of property designed for use in Iowa cannot be taxed if consummated outside the state, our legislature has resorted to the plan (not uncommon in recent years) of taxing the use of such property in the state. The tax is on the use but it presupposes a prior sale. The tax serves the double purpose of producing revenue that otherwise might not be available and of furnishing some measure of protection to Iowa dealers from competition with outside vendors not subject to liability for sales tax. See discussion in *Henneford v. Silas Mason Co.*, 300 U. S. 577, 581, 57 S. Ct. 524, 526, 81 L. Ed. 814, quoted in *Zoller Brewing Co. v. State Tax Commission*, 232

> Iowa 1104, 1106, 5 N.W.2d 643, 6 N.W.2d 843. The law is at the same time apparently drawn with the purpose avoiding double taxation."

237 Iowa at 534, 22 N.W.2d at 788.

The Court has not been apprised that sale or use taxes in any other states substantially differ in their approach or intent so as to be distinctly different from the explanation set forth by the Iowa Supreme Court in *Dain, supra.* The basis of either sale or use tax is the purchase price of the item. The taxable event is when the item is purchased.

In contrast, the basis of the tax imposed by House File 874 is so many cents per gallon of diesel fuel consumed or burned in propelling a locomotive within the State of Iowa. The taxable event is when said fuel is consumed in Iowa. Our tax applies to the consumption of fuel in Iowa, so the required connection or nexus with the taxing State (Iowa) is met.

A business that operates interstate can be tax by multiple jurisdictions so long as each jurisdiction properly apportions the income, use or property subjected to taxation. See *Exxon Corporation v. Wisconsin Department of Revenue,* 447 U. S. 207, 228-229, 65 L. Ed. 2d 66, 84-85, 100 S. Ct. 2109 (1980).

The Iowa legislature in House File 874 and particularly in the apportionment formula contained therein has in this Court's view made an honest effort and attempt to reasonably avoid imposing a tax on fuel that is not consumed in Iowa. If one understands that the tax is on the consumption of fuel in Iowa, by its very terms no other State could tax fuel that is being "consumed" in Iowa.

Obviously, fuel can only be consumed in one geographical area or State.

A 1979 Iowa Supreme Court decision is instructive on this question. In *Cedar Valley Leasing, Inc. v. Iowa Department of Revenue,* 274 N.W.2d 357, the Plaintiff leasing company objected to paying sales tax on the purchase of equipment used in its business. Plaintiff claimed double taxation because the company also was required to pay service tax on its gross receipts for the privilege of renting the equipment.

The Court stated at page 361 of the Northwest 2d citation:

> "The basic premise of Cedar Valley's position is that it is a victim of double taxation. It is willing to pay tax on its gross receipts from the equipment rental but claims it should not have to pay tax when it purchases the equipment. The constitutional aspects of this premise have been abandoned on appeal . . .
>
> "There is no double taxation imposed in this case. Generally speaking, the sales and services taxes are excise taxes: the tax is imposed on the transactions and the privilege to conduct it not the property . . . The sales tax on Cedar Valley machinery acquisition costs is on the privilege of selling the equipment . . . The service tax on the equipment rental is grounded on the privilege of renting or leasing equipment.
>
> "Double taxation occurs only where there is the imposition of the same taxes by the same taxing power upon the same subject matter . . . Contrary to Cedar Valley's characterizations, there exists in this case two separate and distinct transactions which are subject to the tax imposed by Section 422.43. The fact that they occur simultaneously is of no significance . . . The statutory interpretation we adopt does not result in double taxation."

In an effort to superimpose the teaching of *Cedar Valley leasing, supra,* to our fact situation, let us assume for the sake of argument (and in this record that is not an unfair assumption) that the Plaintiffs or some of them have in fact paid other State taxes at the time that they purchased the fuel involved. Under the teaching of *Cedar Valley Leasing, supra,* however, that is not impermissible double taxation as the taxable event and the basis of tax are different. The basis of taxation and the taxable event have been indicated above in this decision.

In any event and in summary, on the basis of this total record and this Court's understanding of the law and its application to these proceedings, this Court determines and rules that there is not impermissible double taxation herein such as to render this tax unconstitutional.

Plaintiffs have failed to carry their burden of proof to the effect that there is an impermissible double taxation herein which deprives them of their property without due process of law or which violates the Commerce Clause of the United States Constitution.

HOUSE FILE 874 IS UNCONSTITUTIONAL BECAUSE IT PERMITS IN ITS APPLICATION THE TAXATION BY THE STATE OF IOWA OF FUEL THAT WAS "CONSUMED" IN ANOTHER STATE

For the most part this contention on the part of the Plaintiffs is based on their assumption that there has not been a reasonable proration and by that process the State of Iowa is attempting and intending to tax these railroads for the consumption of fuel when in fact the fuel was consumed outside of the borders of the State of Iowa. Ob-

viously, no tax scheme is foolproof and accurate to the last penny or to the last detail. This Court has already determined and ruled before in this decision that the proration formula provided for House File 874 coupled with this Court's interpretation of how same should and could be applied is a fair and reasonable attempt on the part of the Defendants to arrive at an *estimate* of the fuel actually consumed by a railroad for propulsion purposes of its railway vehicles within the borders of the State of Iowa. A tax of this nature can be no more than an estimate, and so long as the basis for determining such estimate is reasonable and proper and ascertainable without confiscatory required expenditures of funds on the part of the taxpayer, such process will be upheld.

Plaintiffs have failed to carry their burden of proof to the effect that the effect and application of the tax imposed by House File 874 is to impermissible and unconstitutionally require the railroads to pay a tax to the State of Iowa for fuel that was in fact consumed in another State.

DISCLAIMER

Some of the R-1 reports introduced as evidence contain some form of disclaimer in regards to the state statistics contained in said report. As an example, in Defendants' Exhibit 56 the R-1 report referring to the Burlington Northern Railroad, the following appears at the beginning of the "State Statistics":

> "Notice—the state statistics hereinafter contained are filed pursuant to direction of the regulatory authorities of the State of Iowa. To the extent that such statistics contain allocations to the State of

> Iowa which are in part the result of arbitrary separations or prorations, Burlington Northern, Inc., does not accept such allocations as reflecting actual operating results for the State of Iowa and reserves the right to challenge such results in any proceeding in which they may be utilized."

This Court in its decisions has previously used some of the "State Statistics". It did so with the full understanding of the existence of the aforementioned disclaimer. This Court did not consider that any of the railroads were bound by such statistics, and, of course, all of the railroads had ample opportunity and did in fact challenge some of the figures contained in the State Statistics in these proceedings.

In any event, even while conscious of the aforementioned disclaimer, this Court did determine and rule that the process whereby such State Statistics were collected was a reasonable and proper process and such statistics were a proper basis for the conclusions and decisions that the Court made hereinbefore in this ruling.

SEPARATION OF POWERS VIOLATIONS— FAILURE TO DELINEATE FACTORS

Plaintiffs claim that the Separation of Powers provisions of the Iowa Constitution were violated because the legislature failed to adequately delineate the factors necessary for computation of the tax involved, thus requiring administrative action to fill in the gaps.

Article III, Section 1 of the Iowa Constitution reads as follows:

> "The powers of the government of Iowa shall be divided into three separate departments—the Legis-

> lative, the Executive and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others except in cases hereinafter expressly directed or permitted."

Beginning on page 124 of Plaintiffs' Brief, they set forth and itemize a number of questioned terms and phrases in the tax bill which they contend are factors that are not sufficiently delineated, are so indefinite or uncertain that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Wright v. Town of Huxley,* 249 N. W. 2d 672, 676 (Iowa 1977).

They refer to the definition of "railway vehicle" and particularly as to whether or not that definition includes maintenance equipment. This Court has already ruled that such is not the case. Next, and assuming that "railway vehicle" does include maintenance equipment, they raise the question as to whether or not fuel consumed by moving this equipment from one place to another would be taxable. Again, the Court has ruled that maintenance equipment is not included in the definition of railway vehicle.

They next make reference to "idle in tow" and the "dead in tow" situations. Previously in this decision the Court has indicated that properly validated and verified data and information concerning these two concepts most surely would and should be considered either as a credit to the tax in its computation as "nontaxable purposes" or as a part of some form of alternative plan proposed by a respective railroad.

They refer to the particular figures which must be obtained to compute the tax such as gallons of fuel dispensed in Iowa, miles traveled in Iowa, etc. This Court has previously ruled that these figures or at least reasonable estimates of same are ascertainable by using forms and reporting procedures that are already to some extent being used by the respective railroads.

They refer to the "nontaxable purpose" situation. They raise the question as to what would be considered as such a purpose. The Court has already previously indicated in this decision some of the uses of fuel that would be considered nontaxable. They also refer to the "metering" problem. Previous in this decision the Court has indicated that such is not really a problem since it only is concerned with fuel that is dispensed within the State of Iowa and such metering is already mandatorily required by the suppliers of such fuel to the respective railroads.

This Court has previously ruled and rules now that the tax statutes involved are intelligible and are workable. The Iowa legislature has not unconstitutionally delegated to the administrative branch of government either the authority or the necessity to either complete this tax bill or to fill in what Plaintiffs consider to be necessary and substantial gaps.

In summary therefore, this Court determines and rules that the Plaintiffs have failed to meet their burden of proof that the tax statute involved is so vague and incomplete and so unintelligible and unworkable as to require the delegation of authority to the administrative branch of government to fill in and complete necessary gaps and deficiencies, all in violation of the Separation of Powers Article of the Iowa Constitution.

SEPARATION OF POWERS VIOLATIONS— UNFETTERED DISCRETION TO EXPEND FUNDS FROM THE "FUND"

Plaintiffs again claim that the tax statute violates the above quoted section of the Iowa Constitution dealing with Separation of Powers. They take the position that clear standards and guidelines for the exercise of administrative discretion is not contained in or a part of these tax statutes. It is their position that, again, administrative bodies, in any event those other than the legislature, are given a fairly free rein to decide how the collected funds are to be expended and who is to receive them.

Plaintiffs take the position that the legislature has virtuely said to the administrative agencies here precisely what *Lewis Consolidated School District v. Johnson,* 256 Iowa 236, 127 N.W.2d 118 (1964), emphasized it may not say:

> "You may do anything you think will further the purpose of the law: in doing so you may set up whatever standards you deem necessary, and you may (spend the public funds entrusted to you in accordance with) these standards."

Both parties bring to this Court's attention the Iowa Supreme Court holding and decision in *John R. Grubb, Inc. v. Iowa Housing Finance Authority,* 255 N.W.2d 89 (Iowa 1977). The Iowa Supreme Court enunciated the standard in *Grubb, supra,* as follows:

> "When the legislature has adequtely stated the object and purpose of the legislation and laid down reasonably-clear guidelines in its application, it may then delegate to a properly-created entity the authority to exercise such legislative power as is necessary to carry into effect that general legislative purpose . . .

> "We will not find an unconstitutional delegation if the functions left to the agency are administrative details, not functions of legislation or adjudicating and the statute prescribes in considerable detail what the board may do and how it must proceed."

Plaintiff further brings to the Court's attention from *Grubb, supra,* the fact that the Court only requires that (1) "the legislative goals are intelligible and the policy of the enactment are clearly articulated . . . (2) the authority's powers are specifically laid out . . . (and) (3) the means available to the authority to carry out its purposes are plainly designated."

Plaintiffs cite as the best example of the "unfettered discretion" granted to IDOT and IRFA in this tax bill, Section 6 of House File 874, which indicates how IRFA can spend the money in the Special Railroad Facility Fund. IRFA is authorized to:

> "Determine the location of and select any railroad facility to be provided financial assistance under this chapter and acquire, construct, reconstruct, renovate, rehabilitate, improve, extend, replace, maintain, repair and lease the facility and to enter into contracts for any of these purposes."

In response and argument to such example, Defendants argue that the Plaintiffs must believe that the legislature itself "should accept applications for loans or other financial assistance from interested railroads or shippers, determine the applicant's ability to repay loans, make complex decisions concerning a railway facility's state of deterioration and need for rehabilitation, and analyze rail traffic and alternative transportation modes to determine which rail facilities should be rehabilitated. These activities, as well as myriad others are usually and properly

delegated to an administrative agency and are necessary to implement the policies and goals of HF 874." (Defendants' Reply Brief, page 63)

Plaintiffs further contend that this law, i.e., House File 874, contains such terms as "necessary or beneficial", "viable future", "sufficient need", and "as soon as economically practicable" but does not provide any definitions or guidelines for these terms, interpretation or application. Every term and word used in legislation does not require definition, particularly if the term has some accepted and common use. Government would come to a standstill if legislators were not permitted to delegate to administrative bodies the operational detail of the legislation passed by the legislature. Of course, interpretation and application of the legislation by the administrative body is always subject to review, and that is the safeguard against either abuses of discretion or obvious and intentional abrogation or frustration of legislative intent.

This Court has reviewed this record and the authorities cited by both sides in these proceedings and on the basis of same determines and rules that House File 874 is not so lacking in specifics, guidelines and detail that it authorizes and permits and necessarily requires an administrative body to assume a legislative role.

This Court determines and rules that the Plaintiffs have failed to meet their burden of proof that House File 874 authorizes the legislature to unconstitutionally delegate to an administrative body legislative functions, all in violations of the Separations of Power Article of the Iowa Constitution.

PLAINTIFFS' CLAIM FOR RELIEF AND ATTORNEY FEES UNDER 42 U. S. C., SECTION 1983

Two elements are necessary in order to make a claim for relief under 42 U. S. C., Section 1983. These elements are: (1) deprivation of rights secured by the Constitution and laws of the United States and (2) that the deprivation of the rights was done under color of state law. See *Adickes v. S. H. Kress & Co.,* 398 U. S. 144, 150, 90 S. Ct. 1598, 1604, 26 L.Ed.2d 142, 150 (1970).

The Plaintiffs assert that the implementation of HF 874 violates 42 U. S. C., Section 1983, in that the Plaintiffs have been deprived of various aforementioned constitutional rights and that said deprivation is under color of state law. There is no dispute that the action of the Defendants in implementing HF 874 is under color of state law. Therefore, the second element of the *Adickes, supra,* case is satisfied.

The Defendants argue that they are immune from suit under Section 1983 and alternatively argue that the Plaintiffs cannot assert a Section 1983 violation because the Plaintiffs are not natural persons. The Plaintiffs counter that they are persons under Section 1983 and that they may assert their rights thereunder. Plaintiffs also argue that the Defendants are not immune to a Section 1983 suit.

Regarding the Defendants' argument concerning immunity, the United States Supreme Court has held that sovereign immunity is not a bar to purely prospective declaratory or injunctive relief against State officials,

such as the relief prayed for by the Plaintiffs in this case. See *Ex Parte Young*, 209 U. S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1907); and *Edleman v. Jordan*, 415 U. S. 651, 664, 667-68, 94 S.Ct. 1347, 1356, 1357-58, 39 L.Ed.2d 662, 673, 675 (1974). The relief sought is prospective in nature and seeks to enjoin future conduct of the Defendant and the Eleventh Amendment does not serve as a shield of immunity for the Defendant, *Id.*

Also, a corporation is a "person" under the Constitution and may attack a taxing statute on constitutional grounds. See *Fulton Market Cold Storage Co. v. Cullerton*, 582 F. 2d 1071 (7th Cir. 1978), *cert. denied*, 439 U. S. 1121, 99 S. Ct. 1033, 59 L. Ed. 2d 82 (1979). Therefore, the Plaintiffs may make allegations concerning violations of 42 U. S. C., Section 1983.

Having dealt with the two objections raised by the Defendants in these proceedings, the Court must now turn to a determination as to whether or not the Plaintiff has been deprived of any constitutional rights in violation of 42 U. S. C., Section 1983. As stated above in the many sections of this opinion, HF 874 is not unconstitutional and does not violate any of the Plaintiffs' constitutional rights and does not therefore give rise to a cause of action under 42 U. S. C., Section 1983.

This Court therefore determines and rules that the Plaintiffs have failed to meet their burden of proof that House File 874 as written and as applied to the respective Plaintiffs has the effect of violating any of their constitutional rights, and Plaintiffs have therefore failed to prove they are entitled to relief under and pursuant to 42 U. S. C., Section 1983.

Plaintiffs have requested additional relief in the nature of attorney fees based on their alleged violation of constitutional rights and entitlement to relief under 42 U. S. C., Section 1983. The Court has above determined and ruled that Plaintiffs are not entitled to such Section 1983 relief, and having so determined and ruled it is necessary and encumbent that the Court additionally determine and rule that the Plaintiffs are not entitled to attorney fees in these proceedings.

INTERVENORS

As previously indicated, a Petition of Intervention was filed by Iowa Railroad Shippers Co. It appeared and participated in the hearing on the merits in these proceedings. The Petition of Intervention was filed on January 15, 1982, only ten days prior to the trial on the merits in these proceedings. Defendants objected to the Petition of Intervention claiming that Intervenor was guilty of latches for delay in intervening in these proceedings, that Intervenor has no special interest or no special knowledge to add to these proceedings, that Intervenor has no standing to raise the issues raised in its Petition, and that Intervenor has no standing in this action because it is not a taxpayer and has failed to and neglected to state that it is a taxpayer in the State of Iowa.

These objections were considered by the Court at the beginning of the trial on the merits, and the Court overruled same and permitted the Petition to be filed and permitted Intervenor to take part in the trial on the merits.

Intervenor's Petition sets forth information indicating its members interest in these proceedings, which are

all coupled with and joined with the interest of the Plaintiffs. Intervenor claims that the Act is unconstitutional on its face and as applied to Plaintiffs and Intervenor by reason of all of the violations of the Constitution of the United States and the Constitution of the State of Iowa set forth in Plaintiffs' Verified Petition as amended.

Intervenor prayed that the Court enter a Permanent Injunction, that the Court enter a Declaratory Judgment holding the Act unconstitutional, that the Court enter judgment against Defendants in favor of Intervenor for attorney fees, costs and expenses, and that the Court enter such other and further Orders and judgments as may be just and equitable in the premises.

In regards to the Intervenor and its position in these proceedings, this Court determines and rules that their position is so synonymous and similar to that of the Plaintiffs that without specific reference all of the Court's decisions in these proceedings as same refer to and involve the Plaintiffs shall likewise apply to the Intervenors without the necessity of their being repeated herein.

THE SECOND AMENDMENT TO CHAPTER 307B OF THE CODE

As mentioned above, the most recently adjourned session of the Iowa legislature passed a second amendment to Chapter 307B of the Code. The significance of this second amendment is that Section 24 of House File 874 was amended to the effect that the Iowa Railway Finance Authority *may* require that fuel dispensed in this state only be through meters, if such authority deems metering necessary.

As indicated above, this Court agreed at the request of all counsel to decide these proceedings first without consideration of this second amendment and then secondly with consideration of said second amendment, all for the purpose of eliminating the necessity of respective counsel being back before this Court for a second opinion giving due consideration to this latest amendment.

It appears to this Court that the legislature passed this second amendment, at least the portion of same that has reference to metering, because of the "metering" questions and testimony that was offered in these proceedings. It is this Court's view that the legislature considered that this was a protective measure that would preserve the integrity of the Act in the event that this Court would determine that the requirement of metering was so noxious as to render this Act unconstitutional.

This Court has previously ruled in these proceedings that in its view metering is not anywhere close to being the "boogeyman" either as contemplated or asserted by Plaintiffs in these proceedings. This Court has ruled that only fuel dispensed within the State of Iowa need be metered. This Court has also ruled that the only fuel that has to be metered is that which is delivered into a railway-owned storage facility or is delivered directly into a railway locomotive. This would be delivered by a retailer, and the retailer would be responsible for the metering of such delivered fuel.

Such being the case, this Court determines and rules further that its decision in these proceedings is the same either with or without this second amendment to House File 874.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and this Court's understanding of the applicable law and particularly the burden of proof that rests upon the Plaintiffs and the Intervenor in these proceedings, this Court comes to the following Conclusions of Law:

1. That all Plaintiffs and Intervenor have failed to meet their burden of proof that the Act involved as amended on two occasions is in any way violative of the Constitutions of either the United States of America or the State of Iowa.

2. That the prayed for relief summarized is that for Temporary and Permanent Injunction from enforcement and collection of the tax involved; that disbursement of funds from the Special Railroad Facility Fund be prohibited; that Sections 22-29, inclusive, of House File 874 (and as later amended) be declared unconstitutional; and for attorney fees and costs is in all respects denied to Plaintiffs and to Intervenor.

3. That the Temporary Injunction entered herein on the 28th day of December, 1981, is hereby terminated as of the 28th day of September, 1982, unless further extended.

4. That the Petition of Plaintiffs and of Intervenor should be dismissed at Plaintiffs' and Intervenor's costs.

5. That the attorney for Defendants shall prepare a Decree for the Court's signature in conformity with the foregoing Findings of Fact and these Conclusions of Law on or before the 21st day of September, 1982.

Dated at Des Moines, Iowa, this 8th day of September, 1982.

/s/ A. M. Critelli
Judge, Fifth Judicial District

Copies mailed or hand delivered by the Court
to all counsel of record.

Section 306 of Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 94 Stat. 54 (4-R Act)

Prohibiting Discriminatory Tax Treatment of Transportation Property

Sec. 306. Part I of the Interstate Commerce Act (49 U. S. C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"Sec. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (con-

ducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term—

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

Commerce Clause, U. S. Const. Art. I, § 8, Cl. 3

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

Supremacy Clause, U. S. Const. Art. VI, Cl. 2.

ARTICLE VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Iowa Code Chap. 324A (1983)

CHAPTER 324A

RAILWAY VEHICLE FUEL TAX

This chapter is repealed July 1, 2008; see 81 Acts, 2d Ex. ch 3, § 31

§ 324A.1 RAILWAY VEHICLE FUEL TAX

324A.1 **Purpose**. The purpose of this chapter is to impose an excise tax upon the use within this state of fuel to power railway vehicles. [81 Acts 2d Ex, ch 3, § 22]

324A.2 **Definitions**. As used in this chapter, unless the context otherwise requires:

1. "*Fuel*" means a combustible gas or liquid suitable for the generation of power for the propulsion of railway vehicles, except that it does not include motor fuel as defined in section 324.2.

2. "*Department*" means the department of revenue.

3. "*Railway vehicle*" means a vehicle designed and used primarily upon railways for self-propulsion or for propelling conveyances.

4. "*Railroad company*" means a person responsible for the operation of a railway vehicle within this state. [81 Acts 2d Ex, ch 3, § 23]

324A.3 **Tax imposed.** For the privilege of operating railway vehicles in this state, an excise tax is imposed at the rate of three cents per gallon beginning October 1, 1981 and is imposed at the rate of eight cents per gallon beginning July 1, 1982 upon the use of fuel for the propulsion of a railway vehicle within the state. The tax attaches at the time of use and shall be paid monthly to the department by the railroad company using the fuel. At such time the Iowa railway finance authority deems necessary, it may require that fuel dipensed in this state shall only be through meters which have been approved for accuracy by the Iowa railway finance authority and sealed by the authority. The authority may contract the responsibility for approving and sealing meters to the department of agriculture. Fuel dispensed through sealed meters shall be presumed taxable unless the railroad company proves otherwise. [81 Acts 2d Ex, ch 3, § 24; 82 Acts, ch 1260, § 60]

Referred to in § 324A.6

324A.4 **Railroad company license.** A railroad company responsible for paying the tax imposed by this chapter shall obtain a license from the department. To obtain a license a railroad company shall file an application with the department which shall include the following information:

1. The name of the railroad company.

2. The location of its principal office within the state, if any.

3. A list of each location where fuel will be dispensed on a regular basis.

4. Other information the director of revenue requires. [81 Acts 2d Ex, ch 3, § 25]

324A.5 **Railroad company reports, tax computation and tax payment.** For the purpose of determining a railroad company's tax liability, each railroad company required to obtain a license under this chapter shall file with the department a monthly report. The report shall be filed by the end of the month following the month of use. The report shall include the following information:

1. The total gallons of fuel dispensed in Iowa.

2. The total gallons of fuel dispensed in Iowa and placed in railway vehicles used solely within the state during the reporting period.

3. The total gallons of fuel dispensed in Iowa for nontaxable purposes.

4. The total gallons of fuel dispensed in Iowa and placed in railway vehicles used within and without the state.

5. The total gallons of fuel dispensed outside Iowa and placed into railway vehicles traveling within and without the state.

6. Other information the director of revenue requires.

The report shall be accompanied by a payment equal to the tax due. The taxable gallons of fuel shall be computed by adding the number of gallons of fuel dispensed in Iowa and placed into railway vehicles traveling solely

within the state during the reporting period and the result of multiplying the total gallons of fuel used in railway vehicles traveling within and without Iowa by a fraction the numerator of which is miles traveled in Iowa by railway vehicles traveling within and without Iowa, and the denominator of which is the total miles traveled by the same railway vehicles. The tax shall be computed by multiplying the taxable gallons times the per gallon tax rate.

7. If a railroad company believes that the method of computing the tax by the prescribed mileage formula has operated or will so operate as to subject to taxation a greater portion of fuel than is reasonably attributable to use for the propulsion of a railway vehicle in this state, it shall be entitled to file with the department a statement of objections and of such alternative method of determining fuel use in this state as it believes to be proper under the circumstances. If the department concludes that the mileage formula, in fact, does not reasonably attribute fuel use to the state, it shall redetermine the tax per gallons of fuel by such methods as seems best calculated to assign to the state the portion of fuel reasonably used in this state. [81 Acts 2d Ex, ch 3, § 26]

Referred to in § 324A.6

324A.6 **Annual payment of certain tax liabilities.** Notwithstanding the requirement for monthly payment of the excise tax in sections 324A.3 and 324A.5, if it is reasonably expected, as determined by rules prescribed by the director, that a railroad company's annual tax liability will not exceed one thousand two hundred dollars for a calendar year, the railroad company may request

and the director may grant permission, in lieu of the requirement for monthly payment of tax, that the tax shall be payable on a calendar year basis. The tax is due and payable no later than January 31 following each calendar year in which the railroad company carried on business. [82 Acts, ch 1260, § 61]

324A.7 **Records retained.** Records reasonably required by the department shall be retained by the railroad comany for three years. [81 Acts 2d Ex. ch 3, § 27]

324A.8 **Statutes applicable.** The department shall administer the taxes imposed by this chapter in the same manner as and subject to division IV of chapter 324. [81 Acts 2d Ex, ch 3, § 28]

324A.9 **Deposit of revenues.** The net proceeds of the excise tax imposed on the use of fuel in railway vehicles and any penalties collected under this chapter shall be credited to the special railroad facility fund established in section 307B.23. [81 Acts 2d Ex, ch 3, § 29]

Referred to in §307B.23

Iowa Code Chapter 307B (1983)

CHAPTER 307B

RAILWAY FINANCE AUTHORITY

Referred to in § 307.24

307B.1 **Short title.** This chapter may be referred to and cited as the "Iowa Railway Finance Authority Act." [C81, § 307B.1]

307B.2 **Declaration of necessity and purpose.** The purpose of this chapter is to benefit the citizens of Iowa by improving their general health, welfare and prosperity and insuring the economic and commercial development of the state and by promoting argicultural and industrial improvement. Access to adequate railway transportation facilities is essential to the economic welfare of the state. One purpose of this chapter is to preserve or provide for the citizens of Iowa those railway services now in existence or needed in the state which have a viable future but which for a variety of economic and legal reasons may not exist if the state does not provide the financing or other mechanisms referred to in this chapter. It is the intent of the chapter that any public ownership and control of railway facilities provided for in this chapter be transferred to private ownership as promptly as economically practicable subject to financing requirements. It is futher intended that the authority created in this chapter be vested with all power to enable it to accomplish the purposes of this chapter except the power to operate rolling stock.

It is further intent of this chapter and of the general assembly that, in order to preserve rail competition and to provide for railway service in this state, the authority

work primarily with railroad carriers already providing service in this state based upon their willingness and ability to meet these objectives. [C81, § 307B.2; 81 Acts 2d Ex, ch 3, § 2]

307B.3 **Legislative findings.** The general assembly finds and declares as follows:

1. The establishment of the authority is in all respects for the benefit of the people of the state of Iowa, for the improvement of their health and welfare, for the preservation and creation of employment, and for the promotion of the economy and of agricultural and industrial improvement, which are public purposes.

2. The authority will be performing an essential governmental function in the exercise of the powers and duties conferred upon it by this chapter.

3. There will exist a serious shortage of viable rail lines and railway facilities serving the urban, rural, agricultural and industrial communities of the state.

4. There exists a serious problem in this state regarding the ability of agricultural producers to transport economically farm products to traditional markets because of the abandonment and possible abandonment of railway facilities within the state.

5. These conditions are making it more and more difficult for farmers and farm related businesses to survive in the present state of the economy thus threatening the very heart blood of Iowa.

6. One major cause of this condition has been recurrent shortages of funds in private channels and the high interest cost of borrowing.

7. These shortages have contributed to reductions in construction of new railway facilities, and have made the sale, purchase and repair of existing railway facilities a virtual impossibility in many parts of the state.

8. Iowa faces the possible consequences of two railroad bankruptcies and further reductions in service by other railroads due to deteriorating rail facilities. The loss of rail service on three thousand ninety miles may be the immediate consequence of the bankruptcies, with a resultant increase in transportation costs. This will be accompanied by a reduction in Iowa farm income. Any prolonged loss of service on the essential portions of these rail facilities means the loss of jobs in Iowa and a loss to the state economy.

9. A stable supply of adequate funds for financing of railway facilities is required to encourage construction of railway facilities, the rehabilitation of existing facilities and to prevent the abandonment of others in an orderly and sustained manner and to reduce the problems described in this section.

10. It is necessary to create a railway finance authority to encourage the investment of private capital and stimulate the construction, rehabilitation and repair of railway facilities and to prevent the abandonment of others through the use of public financing, publicly assisted financing and other forms of public assistance.

11. All of the purposes stated in this section are public purposes and uses for which public moneys may be borrowed, expended, advanced, loaned or granted. [C81, § 307B.3; 81 Acts 2d Ex, ch 3, § 3]

307B.4 **Definitions.** For purposes of this chapter, unless the context otherwise requires:

1. "*Authority*" means the Iowa railway finance authority created by this chapter.

2. "*Railway facilities*" means land, structures, fixtures, buildings and equipment, except rolling stock, necessary or useful in providing railroad transportation services, including, but not limited to, roadbeds, track, trestle, depot, switching and signaling equipment and all necessary, useful and related equipment and appurtenances and all franchises, easements and other interests in land and rights of way necessary or convenient as a site or sites for any of the foregoing or any part of or combination of the foregoing.

3. "*Project costs*" means any portion of the costs of railway rehabilitation, acquisition, construction, reconstruction, repair, alteration, improvement or extension of any railway facilities, providing, supplementing and relocating public capital facilities, studies, surveys, plans, specificiations, architectural and engineering services, estimates of costs, legal, organizational, marketing or feasibility studies, and all other necessary and incidental expenses related to the foregoing, and reimbursement of any moneys advanced or applied by a governmental agency or other person for project costs. Project costs include, in connection with obligations, a principal and interest reserve together with interest on obligations to a date not later than six months subsequent to the estimated date of completion of the railway facilities that are the object of the financial assistance.

4. *"Department"* means the Iowa department of transportation.

5. *"Governing board"* or *"board"* means the governing board of the authority created by section 307B.6.

6. *"Obligations"* means bonds, notes or other evidence of debt, including interest coupons of the foregoing, issued under this chapter.

7. *"Financial assistance"* means direct loans and other loans, grants, and forms of assistance authorized under this chapter.

8. *"Governmental action"* means any action by a governmental agency relating to the establishment, development, or operation of railway facilities that the governmental agency acting has authority to take or provide for the purpose under law, including, but not limited to, actions relating to contracts and agreements, zoning, building, permits, acquisition and disposition of property, public capital improvements, utility and transportation service, taxation, employee recruitment and training, and liaison and coordination with and among governmental agencies.

9. *"Governmental agency"* means the state or any state department, division, commission, institution, or authority; a municipal corporation, city, county, or township, or any agency thereof; any other political subdivision or public corporation; the United States or any agency thereof; any agency, commission, or authority established pursuant to an interstate compact or agreement; or any combination of the foregoing.

10. *"Person"* means an individual, firm, partnership, association, corporation or governmental agency, or any combination thereof.

11. *"Public capital improvements"* means capital improvements or facilities including, but not limited to, railroad facilities and related ancillary facilities, that a governmental agency has authority to acquire, pay the costs of, own or maintain, or to do the foregoing by contract with other persons.

12. *"Bond proceedings"* means the resolution, order, trust agreement, indenture, lease, and other agreements, and amendments, and supplements to the foregoing authorizing or providing for the terms and conditions applicable to or the provisions contained within, or providing for the security of, obligations issued pursuant to this chapter.

13. *"Bond service charges"* means principal, including mandatory sinking fund requirements for retirement of obligations, interest and redemption premium, if any, required to be paid by the authority on obligations.

14. *"Pledged receipts"* means the revenues and receipts received or to be received by the authority from the lease, operation or sale or disposition of railway facilities; from loan or other agreements relating to financial assistance; from grants, gifts or payments on guarantees made to the authority by any person; from accrued interest received from the sale of obligations; from income from the investment of special funds of the authority, including the special railroad facility fund; from the revenues and receipts deposited in the special railroad

facility fund; and from any other moneys which are available for the payent of bond service charges.

15. *"Special railroad facility fund"* means the fund created in section 307B.23. [C81, § 307B.4; 81 Acts 2d Ex, ch 3, § 4, 5]

307B.5 **Iowa railway finance authority.** There is created an Iowa railway finance authority for the purpose of providing or providing for the financing of railway facilities and enhancing and continuing the operation of railway facilities as provided in this chapter. [C81, § 307B.5; 81 Acts 2d Ex, ch 3, § 6]

307B.6 **Governing board—staff.**

1. The power of the authority shall be vested in and exercised by a governing board consisting of five members appointed by the governor subject to confirmation by the senate.

2. The members of the governing board shall be appointed by the governor for staggered terms of six years beginning and ending as provided in section 69.19. A person appointed to fill a vacancy shall serve only for the unexpired portion of the term. A member is eligible for reappointment. A member of the board may be removed from office by the governor for misfeasance, malfeasance or willful neglect of duty or other just cause, after notice and hearing, unless the notice and hearing is expressly waived in writing. A member of the board shall not also serve concurrently as a member of the state transportation commission or as an official or employee of the department.

3. Three members of the board constitute a quorum and the affirmative vote of at least three members is necessary for any recommendation made by the board. The majority shall not include any member who has a conflict of interest and a statement by a member of a conflict of interest is conclusive for this purpose. A vacancy in the membership does not impair the right of a quorum to perform the functions and duties of the board.

4. Members of the board are entitled to receive forty dollars per diem for each day spent in performance of their functions and duties as members and reimbursement for all actual and necessary expenses incurred in the performance of their functions and duties as members.

5. Meetings of the board shall be held at the call of the chairperson or when two members so request.

6. Members shall elect a chairperson and vice chairperson annually, and other officers as they determine. However, the director of the department shall be the secretary of the board.

7. The members of the board shall give bond as required for public officers in chapter 64.

8. The members of the board shall be subject to and be officials within the meaning of chapter 68B.

9. The director and staff of the department shall serve as the staff of the authority. The director of the department shall advise the board on matters relating to railroad transportation and carry out all directives from the board, and may employ professional expertise when not available on the department staff.

10. The counsel of the transportation regulation authority and the attorney general's office shall provide legal services for the authority and the board unless a majority of the board deems outside counsel is required in a particular instance. [C81, § 307B.6; 82 Acts, ch 1100, § 16]

Referred to in § 307B.4
Terms of first appointees; 68GA, ch 1095, § 20

307B.7 **Powers of the authority.** The authority shall have all powers necessary for the performance of its purposes an duties, including but not limited to, the power to:

1. Have perpetual succession as a public authority.

2. Adopt rules under chapter 17A for the regulation of its affairs and to carry out its duties and responsibilities. The authority is an agency as that term is defined in chapter 17A and is subject to the provisions of chapter 17A.

3. Sue and be sued in its own name.

4. Exercise the power of eminent domain.

5. Acquire railway facilities, whether located within Iowa or a contiguous state, directly or through an agent, by purchase, lease, lease-purchase, gift, devise or otherwise. The authority shall not submit a bid to acquire a railway facility if any railroad company or person is negotiating for the facility's purchase and if the railroad company's or person's offer exceeds the net salvage value set by the trustee by at least fifteen percent and the offer is for a segment which originates and terminates at the intersection of another railroad mainline or is for a segment which connects to a mainline if the facility is a

branchline. However, even if a railroad company or person is negotiating for a facility's purchase, the authority may submit a bid for the acquisition of the railway facility upon approval of a resolution by the state transportation commission stating that the best interests of the state and the transportation needs thereof might not be served by the railroad company's or person's offer or negotiation. However, the commission shall not adopt such a resolution if the competing railroad corporation or person files with the state department of transportation an enforceable undertaking to operate the facility for a period of five years after its purchase.

6. Determine the location of and select any railway facility to be provided financial assistance under this chapter and acquire, construct, reconstruct, renovate, rehabilitate, improve, extend, replace, maintain, repair and lease the facility, and to enter into contracts for any of these purposes.

7. Enter into contracts, including partnership agreements, with any person for the ownership, operation, management or use of a railway facility. Provisions shall be made in any contract or partnership agreement entered into by the authority that any additional jobs which may result from the ownership, operation, management, or use of a railway facility shall be offered, when practicable, to qualified former employees of the Milwaukee Road or Rock Island railroad companies.

8. Designate an agent to perform its powers under subsections 6 and 7.

9. The authority may sell or convey any of the railway facilities upon terms and considerations acceptable to the governing board.

10. Issue obligations for any of its purposes and refund the obligations, all as provided for in this chapter. However, the total principal amount of obligations outstanding at any one time shall not exceed two hundred million dollars.

11. Invest or deposit moneys of the authority, subject to any agreement with bondholders or noteholders, in any manner determined by the authority, notwithstanding the provisions of chapter 452, 453 or 454.

12. Fix, revise, charge and collect rates, rents, fees and charges for the use of any railway facility or any portion of a facility that is owned or financially assisted by the authority alone or in any other association with any other person and contract with any person in respect to a facility.

13. Mortgage all or any portion of its railway facilities, whether then owned or thereafter acquired, in connection with the financing of the particular railway facility or any portion of the facility.

14. Extend financial assistance for the purpose of providing for project costs. Make interest-free loans for rehabilitation of railway tracks, roadbeds, or trestles to persons which have repaid in part the original loan from the authority which was made for the purpose of the acquisition or rehabilitation of railway tracks, roadbeds, or trestles. However, an interest-free loan to a person shall not exceed the amount repaid of the original loan made to that person and one-half of the amount of the interest-free loan repaid to the authority shall be credited to the railroad assistance fund established in section 327H.18.

15. Extend financial assistance to refund, retire, or refinance obligations, including obligations, running to the federal government, mortgages or advances issued, made or given for the project cost of a railway facility which costs were incurred for railway facilities undertaken and completed prior to or after May 20, 1980 when the governing board finds that this financial assistance is in the public interest.

16. Have and alter a corporate seal.

17. Receive and accept from any person or governmental agency loans, guarantees or grants for or in aid of project costs and receive and accept grants, gifts and other contributions from any source.

18. Own a railway facility under this chapter alone, in partnership, or in any other association with any person if necessary or beneficial to preserve part of a railway system, upon the determination, after consultation with the department, that the railway facility is necessary or beneficial to the railway system, to be relinquished to nonauthority ownership or operation as soon as economically practicable.

19. Temporarily operate a railway facility under this chapter if sufficient need exists or there is an emergency situation as determined by a majority of the board.

20. Pledge any funds contained in the special railroad facility fund to the payment of and as security for obligations issued under this chapter.

21. Invest moneys in the special railroad facility fund in general or limited partnership interests in a partnership formed to purchase, renovate, and operate a railway facility.

22. Serve as a general or limited partner in a partnership formed to purchase, renovate, and operate a railway facility.

23. Enter into agreements with persons to develop, equip, furnish, or otherwise develop and operate railway facilities, and make provision in the agreements for railway facilities and governmental actions, as authorized by this chapter and other laws.

24. Enter into appropriate arrangements and agreements with a governmental agency for the taking or the providing by that governmental agency of a governmental action. [C81, § 307B.7; 81 Acts 2d Ex, ch 3, § 7, 8]

Referred to in § 307B.10, 307B.20

307B.8 **Duties of governing board.** The specific duties of the governing board shall be to:

1. Keep accurate records of all its proceedings and make them available to the public.

2. Exercise its powers and duties consistent with the policies and plans of the state transportation commission submitted by it to the general assembly as required under section 307.10, subsection 1.

3. Issue a public declaration before the issuance of bonds as to the need for and use of the proceeds from the issuance of bonds.

4. When issuing bonds, issue bonds the interest of which will be tax exempt for federal income tax purposes, whenever possible.

5. Contract for services through the department when practicable.

6. Provide an economically designed and reproduced annual report to the members of the general assembly who request it containing information as directed by the legislative council.

7. Consult with the Iowa conservation commission before taking any action that substantially affects wildlife habitat. [C81, § 307B.8; 81 Acts 2d Ex, ch 3, § 9, 10]

307B.9 **Obligations.** Except as provided in this chapter, all obligations are payable solely out of the pledged receipts as designated in the bond proceedings. Tax funds which the authority receives from a political subdivision of the state shall not be pledged for payment of the obligations. Except for those tax funds deposited in the special railroad facility fund as provided in sections 307.29, 435.9 and 324A.8, the state shall not appropriate tax funds, directly or indirectly, to the authority for the purpose of payment of obligations of the authority. Obligations shall be authorized by resolution of the board and bond proceedings shall provide for the purpose of the obligations, the principal amount, the principal maturity or maturities, not exceeding twenty-five years from the date of issuance, the interest rate or rates or the maximum interest rate, the date of the obligations and the dates of payment of interest on them, their denomination, and the establishment within or without the state of a place or places of payment of bond service charges. As much as is practicable within the legal and fiscal limitations inherent in bond issuance, a portion of the bonds shall be issued in denominations of five thousand dollars and smaller, in order to allow smaller investors in the state to purchase the bonds. The purpose of the obligations may be stated in the bond proceedings in terms

describing the general purpose or purposes to be served. The bond proceedings shall also provide, subject to other applicable bond proceedings, for the pledge of all or such part, as the authority may determine, of the pledged receipts to the payment of bond service charges, which pledges may be made either prior or subordinate to other expenses, claims or payments, and may be made to secure the obligations on a parity with obligations issued at other times, if and to the extent provided in the bond proceedings. The pledged receipts so pledged and received by the authority are immediately subject to the lien of the pledge without physical delivery or further act, and the pledge of the pledged receipts is effective and these moneys may be applied to the purposes for which pledged without necessity for an Act of appropriation. Every pledge and every covenant and agreement with respect to a pledge made in the bond proceedings may be extended to the benefit of the owners and holders of obligations authorized by this chapter, and to any trustee for owners and holders, for the further security of the payment of the bond service charges. The authority shall issue a prospectus or official statement in connection with the offering of obligations. Obligations may be issued in coupon or in registered form, or both. Provision may be made for the registration of obligations with coupons attached as to principal alone or as to both principal and interest, their exchange for obligations so registered, and for the conversion or reconversion into obligations with coupons attached of any obligations registered as to both principal and interest, and for reasonable charges for registration, exchange, conversion and reconversion. Obligations may be sold at public or private sale at the price, in the manner, and at the time deter-

mined by the governing board. Chapter 75 and sections 23.12 to 23.16 do not apply to obligations issued under this chapter. All obligations are negotiable instruments.

The bond proceedings may contain additional provisions as to:

1. The redemption of obligations prior to maturity at the option of the authority at the price and under the terms and conditions provided in the bond proceedings.

2. Other terms of the obligation.

3. Limitations on the issuance of additional obligations.

4. The terms of any trust agreement or indenture securing the obligations or under which the obligations may be issued.

5. The deposit, investment and application of special funds and the safeguarding of moneys on hand or on deposit, without regard to chapter 453, subject to this chapter, with respect to particular funds or moneys; provided that any bank or trust company which acts as depository of any moneys in the special funds may furnish indemnifying bonds or may pledge the securities as required by the authority.

6. The provisions of the bond proceedings which are binding upon the officer, board, commission, authority, agency, department or other person or body which has the authority under law to take actions as necessary to perform all or any part of the duty required by a provision.

7. Any provision which may be made in a trust agreement or indenture.

8. Additional agreements with the holders of the obligations, or the trustee for the holders, relating to the obligations or the security for the obligations.

Before the authority can incur an obligation for the acquisition or purchase of railway facilities under this chapter, the proceeds of which are to be contributed, loaned, or otherwise provided to a partnership of which the authority is a partner, the other partners of the partnership must pledge to the partnership in the aggregate an amount equal to at least twenty percent of the amount of the obligations to be incurred for the acquisition or purchase. [C81, § 307B.8 (4-6), 307B.9; 81 Acts 2d Ex, ch 3, § 11]

307B.10 **Refunding of obligations.** The board may authorize and issue obligations for the refunding, including funding and retirement, and advance refunding with or without payment or redemption prior to maturity, of any obligations previously issued by the authority. These obligations may be issued in amounts sufficient for payment of the principal amount of the prior obligations, any redemption premiums on the prior obligations, principal maturities of any obligations maturing prior to the redemption of the remaining obligations on a parity with them, interest accrued or to accrue to the maturity date or dates of redemption of the obligations, and any project costs including expenses incurred or to be incurred in connection with this issuance, refunding, funding, and retirement. Subject to the bond proceedings, the portion of proceeds of the sale of obligations issued under this section to be applied to bond service charges on the prior obligations shall be credited to the appropriate account for those prior obligations. Obligations authorized

under this section shall be deemed to be issued for those purposes for which the prior obligations were issued and are subject to the provisions of this chapter pertaining to other obligations. Obligations refunded shall not be considered to be outstanding for purposes of section 307B.7, subsection 10.

Refunding may be made without regard to whether or not the obligations to be refunded were issued in connection with the same railway facilities, separate railway facilities or for other purposes, and without regard to whether or not the obligations proposed to be refunded shall be payable on the same date or different dates or due serially or otherwise. [C81, § 307B.10; 81 Acts 2d Ex, ch 3, § 12]

307B.11 **Security for obligations.** Obligations may be additionally secured by a trust agreement or indenture between the authority and a corporate trustee which may be any trust company or bank having its principal place of business within the state. Any such agreement, indenture, mortgage, or deed of trust, or any combination thereof, may contain the resolution authorizing the issuance of the obligations, any provisions that may be contained in any bond proceedings, and other provisions which are customary or appropriate in an agreement or indenture of such type, including, but not limited to:

1. Maintenance of each pledge, trust agreement, indenture, or other instrument comprising part of the bond proceedings until the authority has fully paid the bond service charges on the obligations secured by the instrument, or provision for payment has been made.

2. In the event of default in any payments required to be made by the bond proceedings or any other agree-

ment of the authority made as a part of the contract under which the obligations were issued, enforcement of the payments or agreement by mandamus, appointment of a receiver, suit in equity, action at law, or any combination of these.

3. The rights and remedies of the holders of obligations and of the trustee and provisions for protecting and enforcing them, including limitations on right of individual holders of obligations.

4. The replacement of any obligations which become mutilated or are destroyed, lost, or stolen.

The principal of and interest on obligations shall be secured as provided in the bond proceedings by the pledge of pledged receipts and by assignment of leases or other contract rights of the authority, or any person acquiring, leasing, or operating railway facilities assisted under this chapter to third parties, which assignment may cover all or any part of the railway facilities from which the receipts may be derived, including, but not limited to, any enlargements of or additions to any of these railway facilities.

Each pledge shall continue in effect until the principal of and interest on the obligations has been fully paid or provision for the payment has been duly made pursuant to the bond proceedings. [C81, § 307B.11; 81 Acts 2d Ex, ch 3, § 13]

307B.12 **Payment of obligations — nonliability of state.** Obligations issued under this chapter, and judgments based on contract or tore arising from the activities of the authority or persons acting on its behalf, are not a debt or liability of the state or of any political sub-

division within the meaning of any constitutional or statutory debt limitation and are not a pledge of the state's credit or taxing power within the meaning of any constitutional or statutory limitation or provision and no appropriation shall be made, directly or indirectly, by the state or any political subdivision of the state for the payment of the obligations or judgments or to fund any deficiency in the special railroad facility fund, or for the indemnification of a person subject to a judgment arising from that person's actions on the authority's behalf. These obligations and judgments are special obligations of the authority payable solely and only from the sources and special funds provided in this chapter. Funds from the general fund of the state shall not be used to pay interest of principal on obligations of the authority in the event that receipts from the taxes designated for deposit in the special railroad facility fund are insufficient. [C81, § 307B.12; 81 Acts 2d Ex, ch 3, § 14]

307B.13 **Remedies of holders of obligations.**

1. The bond proceedings may provide that a holder of obligations or a trustee under the bond proceedings, except to the extent that the holder's rights are restricted by the bond proceedings, may by legal proceedings, protect and enforce any rights under the laws of this state or granted by the bond proceedings. These rights include the right to compel the performance of all duties of the authority required by this chapter or the bond proceedings; to enjoin unlawful activities; and in the event of default with respect to the payment of any bond service charges on any obligations or in the performance of any covenant or agreement on the part of the authority in the bond proceedings, to apply to a court to appoint

a receiver to receive and administer the pledged receipts which are pledged to the payment of the bond service charges on these obligations or which are the subject of the covenant or agreement, with full power to pay and to provide for payment of bond service charges on these obligations and with powers accorded receivers in general equity cases, excluding any power to pledge additional revenues or receipts or other income or moneys of the authority or the state or governmental agencies of the state to the payment of the bond service charges; and if provided in the bond proceedings, the power to take possession of, mortgage, or cause the sale or otherwise dispose of any railway facilities.

Each duty of the authority and the authority's board, officers, and employees, and of each governmental agency and its officers, members, or employees, undertaken pursuant to the bond proceedings or any agreement or lease, lease-purchase agreement, or loan made under authority of this chapter, and in every agreement by or with the authority, is a duty of the authority, and of each board, officer, member or employee having authority to perform this duty, which may be specifically enjoined by the law resulting from an office, trust or station under chapter 661.

2. If the bond proceedings do not contain provisions authorized in subsection 1, if the authority defaults in the payment of principal or interest on obligations as they become due, whether at maturity or upon call for redemption, and the default continues for a period of thirty days, or if the authority fails or refuses to comply with this chapter or defaults in any covenant or agreement in the bond proceedings made for the benefit of the

holders of obligations, the holders of twenty-five percent in aggregate principal amount of obligations of the issue then outstanding by instrument filed in the office of the clerk of the county in which the principal office of the authority is located and proved or acknowledged in the same manner as a deed to be recorded may appoint a trustee to represent the holders of the obligations for the purposes provided in this section.

The trustee selected may, and upon written request of the holders of twenty-five percent in aggregate principal amount of the issue of obligations then outstanding, shall:

a. Enforce all rights of the holders of the obligations including the right to require the authority to carry out its agreements with the holders and to perform its duties under this chapter.

b. Bring suit upon the obligations.

c. By action require the authority to account as if it were the trustee or an express trust for the holders.

d. By action enjoin any acts or things which are unlawful or in violation of the rights of the holders.

e. Declare all the obligations due and payable and, if all defaults are made good then with the consent of the holders of twenty-five percent of the aggregate principal amount of the issue of obligations then outstanding, annul the declaration and its consequences. Before declaring the principal of obligations due and payable, the trustee shall first give thirty days notice in writing to the governor, to the authority, and to the attorney general of the state.

The trustee selected shall also have all powers necessary or appropriate for the exercise of functions spe-

cifically set forth or incident to the general representation of holders in the enforcement and protection of their rights.

3. The district court has jurisdiction of any action by the trustee on behalf of holders. The venue of the action shall be in the county in which the principal office of the authority is located. [C81, § 307B.13; 81 Acts 2d Ex, ch 3, § 15]

307B.14 **Authority as public instrumentality.** The authority is performing a public function on behalf of the state and is a public instrumentality of the state. Income of the authority and all properties owned by or leased to the authority are exempt from all taxation in the state of Iowa. This chapter does not exempt from taxation properties comprising railway facilities financially assited under this chapter which are owned by persons other than the authority except those leased to the authority. However, properties owned by the authority which are leased or rented to a private person shall include as part of the rates, rents, fees or charges payable by that person a sum equal to the amount of tax, determined by applying the tax rate of the taxing district to the assessed value of the property, which the state, county, city, school district or other political subdivision would receive if the property were owned by a private person, any other statute to the contrary notwithstanding. This sum shall be distributed to each taxing district based upon its tax equivalent. For purposes of arriving at that tax equivalent, the property shall be valued and assessed by the assessor in whose jurisdiction the property is located, in accordance with chapter 441, but the authority, the lessee or renter on behalf of the authority, and other

persons as are authorized by chapter 441 shall be entitled to protest any assessment and take appeals in the same manner as any taxpayer. The valuations shall be included in any summation of valuations in the taxing district for all purposes known to the law. Income from this source shall be considered under the provisions of section 384.16, subsection 1, paragraph "b". [C81, § 307 B.14; 81 Acts 2d Ex, ch 3, § 16]

307B.15 **Powers not restricted — law complete in itself.** This chapter is not a restriction or limitation upon any powers which the authority or another governmental agency has under any laws of this state, but is cumulative to any such powers. No proceedings, referendum, notice or approval is required for the creation of the authority or the issuance of any obligations or any instrument as security except as provided in this chapter. However, nothing in this chapter deprives the state and its political subdivisions of their police powers over properties of the authority or impairs any power over the authority of any official or agency of the state and its political subdivisions which is otherwise provided by law. [C81, § 307B.15; 81 Acts 2d Ex, ch 3, § 17]

307B.16 **Limitation of liability.** The members of the board and persons acting in the board's behalf, while acting within the scope of their employment or agency, shall be employees of the state within the meaning of chapter 25A and the provisions, except section 25A.11, of that chapter shall apply to such members and persons. Any awards to a claimant under chapter 25A resulting from actions involving the board or a person acting in the board's behalf shall be payable solely from funds of the authority and funds received from the state shall not be used to pay such awards. [C81, § 307B.16]

307B.17 **Exemption from construction and bidding requirements for public buildings.** A railway facility is not subject to any requirements relating to public buildings, structures, grounds, works or improvements imposed by any other law, except as determined by the governing board, or any other similar requirements which may be lawfully waived by this section and any requirement of competitive bidding or other restriction imposed on the procedure for awarding contracts for such purpose or the lease, sale, or other disposition of property of the authority is not applicable to any action taken under the provisions of this chapter. [C81, § 307B.17]

307B.18 **Liberal interpretation.** This chapter, being necessary for the welfare of this state and its inhabitants, shall be liberally construed to effect its purposes. [C81, § 307B.18]

307B.19 **Governmental Agencies.** A governmental agency may enter into an agreement with the authority, another governmental agency, or a person to be assisted under this chapter to take or provide for the purposes of this chapter any governmental action it is authorized to take or provide and to undertake on behalf and at the request of the authority any action which the authority and the agency are authorized to undertake. Governmental agencies of the state shall co-operate with and provide assistance to the director and the authority in the exercise of their functions under this chapter. [81 Acts 2d Ex, ch 3, § 18]

307B.20 **Bond anticipation notes.** The power to issue obligations under this chapter includes power to issue obligations in the form of bond anticipation notes and

to renew these notes by the issuance of new notes, but the maximum maturity of these notes, including renewals, unless otherwise authorized by the general assembly, shall not exceed five years from the date of the issuance of the original notes. The holders of these notes or interest coupons of the notes have a right to be paid solely from the pledged receipts pledged to the payment of the bonds anticipated, or from the proceeds of those bonds or renewal notes, or both, as the authority provides in the bond proceedings authorizing the notes. The notes may be additionally secured by covenants of the authority to the effect that the authority will do those acts authorized by this chapter and necessary for the issuance of the bonds or renewal notes in appropriate amount, and either exchange the bonds or renewal notes therefor, or apply the proceeds of the notes to the extent necessary, to make full payment of the principal of and interest on the notes at the time contemplated, as provided in the bond proceedings. For such purpose, the authority may issue bonds or renewal notes in a principal amount and upon terms as are authorized by this chapter and are necessary to provide funds to pay when required the principal of and interest on the outstanding notes, notwithstanding any limitations prescribed by this chapter, other than the limitation contained in section 307B.7, subsection 10. All provisions for and references to obligations in this chapter are applicable to notes authorized under this section to the extent not inconsistent with this section. [81 Acts 2d Ex, ch 3, § 18]

307B.21 **Investment in obligations.** All banks, trust companies, building and loan associations, savings and loan associations, investment companies and other persons

carrying on a banking or investment business, all insurance companies, insurance associations and other persons carrying on an insurance business and all executors, administrators, guardians, trustees and other fiduciaries may legally invest any sinking funds, moneys, or other funds belonging to them or within their control in obligations issued pursuant to this chapter. However, this section does not relieve any persons from a duty of exercising reasonable care in selecting securities for purchase or investment. [81 Acts 2d Ex, ch 3, § 18]

307B.22 **Notice.** The authority shall publish a notice of its intention to issue obligations in a newspaper published in and with general circulation in the state. The notice shall include a statement of the maximum amount of obligations proposed to be issued, and in general terms, what receipts will be pledged to pay bond service charges on the obligations. An action which questions the legality or validity of obligations or the power of the authority to issue the obligations or the effectiveness or validity of any proceedings adopted for the authorization or issuance of the obligations shall not be brought after sixty days from the date of publication of the notice. [81 Acts 2d Ex, ch 3, § 18]

307B.23 **Special railroad facility fund.** There is created in the office of the state treasurer a "special railroad facility fund". This fund shall include moneys credited to this fund under sections 307.29, 435.9, 324A.9, and other funds which by law may be credited to the special railroad facility fund. The moneys in the special railroad facility fund are hereby appropriated to and for the purpose of the authority as provided in this chapter. The funds in the special railroad facility fund shall not be

considered as a part of the general fund of the state, shall not be subject to appropriation for any other purpose by the general assembly, and in determining a general fund balance shall not be included in the general fund of the state but shall remain in the special railroad facility fund to be used for the purposes set forth herein. The state treasurer shall act as custodian of the fund and disburse amounts contained in it as directed by the authority. The state treasurer is authorized to invest the funds deposited in the special railroad facility fund at the direction of the authority and subject to any limitations contained in the bond proceedings. The income from such investment shall be credited to and deposited in the special railroad facility fund. This fund shall be administered by the authority and may be used to purchase or upgrade railroad right of way and trackage facilities or to purchase general or limited partnership interests in a partnership formed to purchase, upgrade, or operate railroad right of way and trackage facilities, to pay or secure obligations issued by the authority, to pay obligations, judgments, or debts for which the authority becomes liable in its capacity as a general partner, or for any other use authorized under this chapter.

Any moneys credited to the special railroad facility fund under sections 435.9 and 324A.9 shall be deposited in a separate account within the special railroad facility fund. The authority may issue obligations under this chapter which are secured solely by the moneys to be deposited in that separate account and the holders or owners of any such obligations shall have no rights to payment of bond service charges from any other funds in the special railroad facility fund, including any moneys

accruing to the authority from the lease, sale or other disposition, or use of railway facilities, or from payment of the principal of or interest on loans made, or from any other use of the proceeds of the sale of the obligations, and no such moneys may be used for the payment of bond service charges on any such obligations, except for accrued interest, capitalized interest, and reserves funded from proceeds received upon the sale of the obligations. [81 Acts 2d Ex, ch 3, § 19]

Referred to in § 307.29, 307B.4 (15), 324A.9, 435.9